CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1930

JOHN B. SUTHERLAND v. R. C. McLEAN AND J. O. FAYSOUX.

(Filed 10 September, 1930.)

1. **Judgments K b—Judgment by default may be set aside by defendant without fault who has employed counsel of another county to appear therein.**

   An attorney who has obtained a license to practice law from the Supreme Court has a right to practice in the courts of all the counties of the State, and where a client has employed a licensed, reputable attorney of good standing, residing in one county to defend him in an action pending in another county, and has put him in possession of the facts constituting the defense, and the attorney has prepared and properly filed an answer: *Held*, upon a judgment being obtained for the negligent failure of the attorney to appear and defend the cause when called for trial, the defendant may have the judgment set aside for surprise and excusable neglect upon his motion aptly made, the negligence of the attorney not being imputed to the client, and the latter being without fault.

2. **Same—Where answer stating meritorious defense has been filed, finding to that effect is not necessary to set aside judgment for surprise, etc.**

   Where a judgment has been obtained against a defendant for failure to appear and defend an action when it was called for trial, a finding of a meritorious defense is not necessary in order to set aside the judgment for surprise and excusable neglect when the defendant has filed an answer in the cause alleging facts which, if believed, would constitute a meritorious defense, it appearing to the appellate court that the allegations of the answer were sufficient.

STACY, C. J., dissenting; ADAMS, J., concurs in dissent.

APPEAL by the defendant, R. C. McLean, from *Clement, J.*, at July Term, 1928, of ASHE.

The plaintiff instituted an action in Ashe County against the defendants. The appealing defendant, R. C. McLean, was at the time of the commencement of the action a citizen of Gaston County. The summons was issued out of the Superior Court of Ashe County on 17 June, 1927, and a verified complaint was duly filed on said date. The summons was served on both defendants on 20 June, 1927. When the summons and complaint were served the appealing defendant employed Mangum & Denny, a firm of reputable lawyers living in Gaston County. He disclosed to his attorneys all the facts constituting his defense, and they prepared an answer, which was duly filed in the Superior Court of Ashe County on 1 July, 1927. The cause came on for trial at the July Term, 1928. Neither of the defendants appeared in person or by attorneys, and upon the verdict of the jury judgment was entered against the defendant for the sum of $885.75, with interest and costs. On 21 November, 1928, the defendant McLean, after due notice, made a motion before the clerk to set aside said judgment on the ground of mistake, inadvertence, surprise and excusable neglect as provided by C. S., 600. The clerk overruled the motion of the defendant and he appealed to the judge of the Superior Court. The judge found three facts, to wit: (1) That the appealing defendant McLean employed the firm of Mangum & Denny, attorneys at law, to represent him in the trial of the cause; (b) that the defendant did not employ any local counsel in regular attendance upon the Superior Court of Ashe County; (c) that the firm of Mangum & Denny did not regularly attend the Superior Court of Ashe County.

Upon the foregoing facts the judge refused to set aside the judgment, and the defendant McLean appealed.

T. C. Bowie for plaintiff.

W. H. Sanders and W. R. Bauguess for defendant, R. C. McLean.

BROGDEN, J. The case presents a single proposition of law, to wit: What duty does the law impose upon a defendant in a civil action with reference to the preparation and trial of his cause?

There are a host of decisions in this State upon the subject, and many of them are totally irreconcilable. However, it is fairly clear that two imperative duties are imposed upon a defendant in a civil action: First, he must give to the litigation such attention "as a man of ordinary prudence usually bestows upon his important business." This principle is announced in many cases, of which the following are illustrative: *Kerchner v. Baker,* 82 N. C., 169; *Pepper v. Clegg,* 132 N. C., 312, 43

S. E., 906; *Jernigan v. Jernigan,* 179 N. C., 237, 102 S. E., 310; *Lumber Co. v. Chair Co.,* 190 N. C., 437, 130 S. E., 12. Second, the defendant must employ counsel.

In *Manning v. R. R.,* 122 N. C., 824, 28 S. E., 963, this Court said: "Litigation must ordinarily be conducted by means of counsel; and, hence, if there is neglect of counsel, the client will be held excusable for relying upon the diligence of his counsel, provided he is in no default himself. . . . He must, however, not only pay proper attention to the cause himself, but he must employ counsel who ordinarily practices in the court where the case is pending, or who are at least entitled to practice in said court and engage to go thither." Another portion of the same opinion declares: "Besides, even if the general counsel of the defendant, to whom the summons was sent, had been counsel regularly authorized and empowered to practice in the courts of this State, it does not appear that he was in the habit of attending regularly the courts of Bertie County, or especially agreed to attend the term of said court in this matter, and in the absence of such proof the defendant has not shown that it has paid proper attention to the case, and that its neglect was excusable, and this burden was on the defendant."

Apparently this case was the first to intimate that home geography had anything to do with the efficiency or diligence of counsel in representing clients. Moreover, the *Manning case* involved the employment of an attorney who was a nonresident of North Carolina, and therefore had no right to practice in our courts, and who did not habitually practice therein.

Again in *Bank v. Palmer,* 153 N. C., 501, 69 S. E., 507, this Court said: "It has been held by this Court that a party litigant 'who seeks to be excused for laches, on the ground of excusable neglect, must show that the counsel employed is one who regularly practices in the court where the litigation is pending, or at least one who is entitled to practice therein and was especially engaged to go thither and attend to the case.' " Citing *Manning v. R. R.* The *Palmer case* also involved the employment of a nonresident attorney.

Up to this point the duty imposed upon a defendant was to employ an attorney who either practiced regularly in the county where the litigation was pending or who was entitled to practice therein and was especially engaged to go thither, but this rule is tremendously expanded in later cases. Thus, in *Jernigan v. Jernigan,* 179 N. C., 237, 102 S. E., 310, the Court says: "It further appears that he employed attorneys not residing in Harnett County, where the case was pending, and not practicing in its courts. The learned judge could consider this fact upon the question of negligence." In the *Jernigan case,* suit was brought in Harnett, and the defendant employed able and reputable counsel at Smithfield in Johnston County, only a few miles away.

Again in *Cahoon v. Brinkley,* 176 N. C., 5, 96 S. E., 650, this Court said: "Where the defendant employs a counsel nonresident in this State, or even counsel in this State who does not reside in the county of trial, or who does not habitually attend that court, the judgment, for want of an answer, will not be set aside, for such neglect is inexcusable."

It is apparent, therefore, that the home geography rule was not at first contemplated; but, according to these decisions, it is the duty of a defendant, even though he employs reputable and efficient counsel in one county, to also employ local counsel residing in the county where the cause is to be tried. Under this rule, if a defendant relies upon the home-grown product, he is safe from the penalty of negligence; but if he relies upon a reputable attorney, duly authorized to practice in all the courts of North Carolina, but who does not happen to be affected by the local geography of the trial, he must suffer the consequence of his negligent act.

The rule requiring a litigant to employ local counsel was apparently built upon the idea that the counties of the State were foreign jurisdictions with respect to each other, and harks back to a time when transportation facilities and inter-communication in the State were crude and ineffective, thus rendering it practically impossible for a lawyer to attend to business beyond the range of his immediate vicinity. This conception was expressed in *Cogdell v. Barfield,* 9 N. C., 332, decided in 1823. In that case the defendant employed a lawyer in Duplin to appear and defend a case in Sampson. The attorney failed to discharge his duty. The Court declared that the defendant was entitled to no relief because he "incurred the risk of counsel's attendance, who did not practice in the court, while he was told of others that would be in attendance." This, of course, is a quaint doctrine as it seems, the defendant was penalized for failure to take the advice of volunteers who undertook to recommend good lawyers that could endure the hardship of the journey of a few miles from Duplin to Sampson. Nevertheless, it is quite apparent that the ideas of professional diligence and contacts with the court, obtaining over one hundred years ago, are still invoked to measure the professional responsibility of attorneys in this modern day of changed conditions and changed professional obligations.

The true rule was first expressed in *Griel v. Vernon,* 65 N. C., 76. This Court declared: "In this case the party retained an attorney to enter a plea for him; that an attorney should fail to perform an engagement to do such an act as that, we think may fairly be considered a surprise on the client; and that the omission of the client to examine the records in order to ascertain that it had been done, was an excusable neglect."

Again, in *Taylor v. Pope,* 106 N. C., 267, 11 S. E., 257, the defendant attended court, but was assured by this attorney that "he would attend to the case." Relying upon such assurance, he left the court and judgment was taken against him. This Court held that the judgment should have been vacated.

In *Seawell v. Lumber Co.,* 172 N. C., 320, 90 S. E., 241, the defendant employed counsel in Duplin to take charge of a suit instituted in Robeson County. The attorney so employed failed to secure counsel in Robeson County and judgment was entered. Upon motion duly made to set the judgment aside upon the ground of excusable neglect, this Court said: "The distinction between the negligence of counsel, while engaged in the performance of a professional duty, and the negligence of the party, is clearly marked, and the uniform rule with us is that the negligence of the first will not be attributed to the client if he, himself, is in no fault; and this is true without regard to the solvency or insolvency of counsel." Again, it is said in the opinion "that the client who has employed a reputable attorney who is entitled to practice in the county where the action is pending, who is himself not in default, will be relieved." Applying the principles of law thus announced, the Court held that counsel employed in Duplin County was entitled to practice in the courts of Robeson County, and that for such reason the client was in no default, and was therefore entitled to have the judgment set aside.

Again in *Grandy v. Products Co.,* 175 N. C., 511, 95 S. E., 914, the defendant employed counsel in New Hanover to represent him in a cause instituted in Mecklenburg County. A copy of the calendar was mailed to such counsel and thrown in the waste basket without being read. A judgment was obtained against the defendant and was set aside. The Court said: "If, however, the negligence of counsel is established, this is not sufficient reason for denying relief to the defendant, since it has been held in numerous cases that the negligence of counsel in the performance of professional duties will not be attributed to the client." The principle is reiterated in *Helderman v. Mills Co.,* 192 N. C., 626, 135 S. E., 627, *Justice Connor,* writing for the Court, says: "Whether the neglect of the attorney to file the answer was upon the facts found, excusable, is not determinative of defendant's right to relief upon its motion; defendant having retained an attorney well known to it, for his high character and excellent professional standing, had the right to assume that he would advise it when and what action was required of it for making its defense. Upon the facts found, the conclusion that defendant's negligence was excusable, cannot be held to be error. The negligence of the attorney, upon the facts found, even if conceded, will not be imputed to defendant, who was free from blame."

The law, as set forth, in the foregoing quotations from our decisions, is supported by a host of cases in this jurisdiction, which surround the principles announced therein as a shining cloud of witnesses. *English*

v. English, 87 N. C., 497; *Ellington v. Wicker,* 87 N. C., 14; *Geer v. Reams,* 88 N. C., 197; *Gwathney v. Savage,* 101 N. C., 103, 7 S. E., 661; *Taylor v. Pope,* 106 N. C., 267, 11 S. E., 257; *Gaylord v. Berry,* 169 N. C., 733, 86 S. E., 623; *Schiele v. Insurance Co.,* 171 N. C., 426, 88 S. E., 764; *Edwards v. Butler,* 186 N. C., 200, 119 S. E., 7.

When the Supreme Court of North Carolina issues a license to an attorney, he is thereby entitled to practice in all the courts of this State. Furthermore, the very act of issuing the license is a solemn declaration of this tribunal that the person so licensed is possessed of that upright character and degree of learning which merits the confidence of those who commit their business into his hands. Attorneys, by virtue of the fact that they are officers of the Court, ought to be diligent; and if they fail to discharge the duties of employment, they ought to be held to strict accountability for negligence. But the client is not supposed to know the technical steps of a lawsuit any more than the patient the technical treatment for disease. Thus, as a matter of necessity, the client must rely upon his lawyer, and the patient must rely upon his physician. Undoubtedly, it is the duty of the client to furnish to his attorney all the facts with respect to his case, the names and addresses of his witnesses, and to hold himself in readiness at all times to attend the court where his cause is pending, and to do such other things as may be necessary for the prompt and diligent dispatch of business.

In the case at bar, the client employed reputable, skilled and competent counsel. He confided the facts constituting his defense and thereupon an answer was duly prepared and properly filed. He had no further notice until the judgment was rendered and the door of the courts closed against him. This record does not disclose that the client was guilty of any negligence or inattention unless he was required to employ two lawyers to perform the same duty; that is to say, a lawyer in Gaston and a lawyer in Ashe. This rule requiring a double agency for the performance of a single act, cannot be supported by logic or reason, and does not obtain anywhere else in our entire economic system.

The point is made that the trial judge did not find that the defendant had a meritorious defense. There are decisions to the effect that a failure to make such finding is fatal. There are decisions to the contrary. For instance, in *English v. English,* 87 N. C., 497, this Court said: "Nor can we give our assent to the proposition that before setting aside the judgment, it was the judge's duty to have ascertained as a fact, whether there existed a meritorious defense to the action, since, that would necessitate a trial by the court, of all the issues involved, and be to anticipate the very purposes of the motion. The affidavit of the defendant sets forth facts which establish a prima facie defense, and that is all the law requires."

Indeed it is the duty of the court to state the facts constituting the defense in order that the Supreme Court may determine the merit of the question. *Winborne v. Johnson,* 95 N. C., 46; *Vick v. Baker,* 122 N. C., 98, 29 S. E., 64; *Gaylord v. Berry,* 169 N. C., 733, 86 S. E., 623.

In the *Gaylord case, supra,* the court examined the affidavits filed and found therefrom a meritorious defense, although the trial judge found to the contrary and remanded the case for "fuller findings of fact, with leave to file additional affidavits, if the parties are so advised."

In those cases in which no answer has been filed the nature of the defense must necessarily be presented by affidavits. In such event it would be necessary for the trial judge to find whether or not there was a meritorious defense. But in cases where the pleadings have been filed an inspection of the pleading itself will disclose to the reviewing court whether a meritorious defense was alleged. This perhaps explains the irreconcilable ruling of the court upon the subject. In support of this view it is perhaps more than significant that the following cases: *Bowie v. Tucker,* 197 N. C., 671, 150 S. E., 200; *School v. Peirce,* 163 N. C., 424, 79 S. E., 687; *Hardware Co. v. Buhmann,* 159 N. C., 511, 75 S. E., 731; *Norton v. McLaurin,* 125 N. C., 185, 34 S. E., 269; *Taylor v. Gentry,* 192 N. C., 503, 135 S. E., 327; *Albertson v. Terry,* 108 N. C., 75, 12 S. E., 892; *Holcomb v. Holcomb,* 192 N. C., 504, 135 S. E., 287, were all cases in which no answer had been filed; and in these cases the absence of a finding of meritorious defense has been featured.

In the case at bar an answer was filed in apt time and is here before us. An examination of the answer discloses that facts are alleged, which, if believed, would constitute a meritorious defense.

It is suggested that the trial courts may experience difficulty in following the construction of the law herein declared, but the plain answer is that in order to follow the decisions now existing, it would be necessary to possess the double head of Janus, and such transcendent qualification ought not to be required of trial judges.

It appears that the appealing defendant duly employed well-known and reputable attorneys, disclosing all the facts necessary to his defense, and that an answer was duly prepared and filed in apt time, containing a meritorious defense. It further appears that said attorneys accepted the employment by making an appearance in due time, and that they were entitled to practice in the Superior Court of Ashe County as a matter of right, and that no negligence is disclosed upon the part of the appealing defendant. Therefore, we hold, and so decree that the defendant is entitled to have the judgment complained of set aside.

Reversed.

STACY, C. J., dissenting: This decision, among other things, renders the following cases of doubtful authority, if it does not overrule them:

Lumber Co. v. Chair Co., 190 N. C., 437, 130 S. E., 12; *Jernigan v. Jernigan,* 179 N. C., 237, 102 S. E., 310; *Cahoon v. Brinkley,* 176 N. C., 5, 96 S. E., 650; *Ham v. Person,* 173 N. C., 72, 91 S. E., 605; *Allen v. McPherson,* 168 N. C., 435, 84 S. E., 766; *Pierce v. Eller,* 167 N. C., 672, 83 S. E., 758; *School v. Peirce,* 163 N. C., 424, 79 S. E., 687; *McLeod v. Gooch,* 162 N. C., 122, 78 S. E., 4; *Hardware Co. v. Buhmann,* 159 N. C., 511, 75 S. E., 731; *Bank v. Palmer,* 153 N. C., 501, 69 S. E., 507; *Osborn v. Leach,* 133 N. C., 428, 47 S. E., 811; *Pepper v. Clegg,* 132 N. C., 312, 43 S. E., 906; *Norton v. McLaurin,* 125 N. C., 185, 34 S. E., 269; *Manning v. R. R.,* 122 N. C., 824, 28 S. E., 963; *Vick v. Baker,* 122 N. C., 98, 29 S. E., 64; *Roberts v. Alman,* 106 N. C., 391, 11 S. E., 424; *Bradford v. Coit,* 77 N. C., 72; *Sluder v. Rollins,* 76 N. C., 271; *Waddell v. Wood,* 64 N. C., 624; *Cogdell v. Barfield,* 9 N. C., 332.

The ancient maxim, *"vigilantibus et non dormientibus subvenit lex,"* has frequently been applied in cases of this kind. *Lumber Co. v. Chair Co., supra; Jernigan v. Jernigan, supra; Battle v. Mercer,* 187 N. C., 437, 122 S. E., 4; *S. c.,* 188 N. C., 116, 123 S. E., 258. "It early grew into one of the cardinal maxims of the law, that it will assist those who are diligent and not those who sleep on their rights, and the law will not take from him who has been thus diligent, what he has secured thereby, and turn it over to him who has lost it by his inaction"—*Walker, J.,* in *School v. Peirce, supra.*

"It has been held repeatedly by this Court that persons of sound mind who are served with process must be active and diligent, and that if they fail to give litigation the attention which a man of ordinary prudence usually gives to his important business, they can have no relief under the statute"—*Allen, J.,* in *Pierce v. Eller, supra.*

"The least that can be expected of a person having a suit in court is that he shall give it that amount of attention which a man of ordinary prudence usually gives to his important business"—*Rodman, J.,* in *Sluder v. Rollins, supra.*

"When a man has a case in court the best thing he can do is to attend to it."—*Clark, C. J.,* in *Pepper v. Clegg, supra.*

The decisions in *Lumber Co. v. Chair Co., supra,* and *Manning v. R. R., supra,* do not approve of "attending to legal proceedings at long range."

Furthermore, there is no finding of a meritorious defense, and no request that such a finding be made. This is fatal to appellant's case. *Bowie v. Tucker,* 197 N. C., 671, 150 S. E., 200; *School v. Peirce, supra; McLeod v. Gooch, supra; Hardware Co. v. Buhmann, supra; Norton v. McLaurin, supra; Taylor v. Gentry,* 192 N. C., 503, 135 S. E., 327; *Albertson v. Terry,* 108 N. C., 75, 12 S. E., 892. "We do not consider affidavits for the purpose of finding facts ourselves in motions of this sort." *Gardiner v. May,* 172 N. C., 192, 89 S. E., 955; *Holcomb v. Holcomb,* 192 N. C., 504, 135 S. E., 287. Indeed, in the instant case, there being no dispute as to the facts found, and no request to find additional facts, the affidavits of the parties have no proper place in the case on appeal. *Osborn v. Leach, supra.* The judge's findings on the present record are conclusive and irreviewable. *Allen v. McPherson, supra; Crye v. Stoltz,* 193 N. C., 802, 138 S. E., 167. And they are binding on us. *Turner v. Grain Co.,* 190 N. C., 331, 129 S. E., 725; *Gaster v. Thomas,* 188 N. C., 346, 124 S. E., 609.

The present case goes a bowshot farther than anything in the books, and the trial courts may have some difficulty in following it. The plaintiff did all that the law has heretofore required of him to obtain a valid judgment against the defendants. And even upon the next trial, if the defendants should again fail to appear, either in person or by attorney, the plaintiff may well inquire: What shall I do to insure a valid proceeding?

ADAMS, J., concurs in this opinion.

GEORGE COLVIN AND RILEY COLVIN v. TALLASSEE POWER COMPANY.

(Filed 10 September, 1930.)

1. **Highways C a—Power of commissioners to abandon county highway must be exercised strictly according to provisions of statute.**

Where the county commissioners have the statutory power to close and abandon a public county highway, the method prescribed by statute must be complied with, and in this case *held:* a resolution abandoning a road without giving notice and an opportunity to be heard was not a sufficient compliance with the statute.

2. **Highways D a—Agreement of commissions to obstruction of road in this case was ineffective, and obstruction was wrongful.**

An agreement by the board of county commissioners having authority to close a public road of a county that a power company might obstruct the road by ponding water thereon is not effective when the abandonment of the road by the commissioners has not been done in accordance with the statutory provisions, and the subsequent obstruction of the road by the power company is wrongful.

3. **Easements A a—Evidence of adverse use of certain land as a road creating an easement thereover held sufficient.**

Evidence that the plaintiff had used a road upon the private land of the defendant for ingress or egress to his own land for a sufficient period of time, had worked upon it, and used it continuously, openly and adversely, is *held* sufficient evidence of adverse user to be submitted to the jury upon the issue as to whether he had acquired an easement thereover.

4. **Same—Adverse user must be continuous and adverse to owner in order to create an easement thereover.**

In order for the owners of land along a roadway to acquire prescriptive right of ingress and egress thereover the use must be continuous and adverse to the owner of the road, and for a sufficient length of time to confer the right, and the fact that in going over the road at some period bars had to be laid down is for the jury to consider upon the question of adverse user.

5. **Highways D a—Party suffering special damage may recover for wrongful obstruction of road.**

Where the plaintiffs' only means of ingress and egrees to this land is destroyed by the wrongful obstruction of a highway he has suffered special damage differing not only in degree, but also in kind from that suffered by the community at large, and he is entitled to recover of the one wrongfully obstructing the road his damages resulting therefrom.

APPEAL by defendant from *Schenck, J.,* and a jury, at September Term, 1929, of GRAHAM. No error.

Plaintiffs bring this action against defendant for damages for flooding the roads which deprived them of ingress and egress to their homes. The plaintiffs allege that "The defendant, during the year 1927, constructed a large concrete dam across Cheoah River just below the mouth of Santeetlah Creek, in Graham County, and about 9 miles below Robbinsville, for the purpose of impounding the waters of said river and its tributaries, creating a reserve basin and lake which covers the entire river basin of Cheoah River and Santeetlah Creek for several miles, covering and flooding with water all of the public roads and passways therein. . . . That prior to, and up until the defendant wrongfully constructed its dam and flooded with water the said basin and areas of land, plaintiffs' land and premises was easily and amply accessible by means of a public road which connected with the old Turnpike or County Road at Stump Ford, near the mouth of Santeetlah Creek and led up said Santeetlah Creek to the plaintiffs' homes; that the said public road has been publicly maintained and used by the citizens in that neighborhood and the public at large for a period of more than forty (40) years and accommodated the community and neighborhood of plaintiffs' residence. That the said public road was the only means and way of access by wagon or other vehicle and the only road over which transportation and hauling could be done to and from plaintiffs' home. That the defendant, by the construction of its said dam on the Cheoah River, impounding the water thereof and creating a storage basin and lake which extends from the dam up to within about a mile of Robbinsville and up Santeetlah Creek to some distance below plaintiffs' home, wrongfully and without consent of the citizens of the neighborhood or any lawful right, flooded the aforesaid public road which accommodated plaintiffs' home and land covering the said road and the entire basin of both sides of the creek through which the road passed, under many feet of water, thereby wrongfully and unlawfully blockading, obstructing and destroying the said public road and every means of access, egress and ingress to plaintiffs' home and premises, leaving the plaintiffs' said home and premises isolated and inaccessible to any of the other neighborhood and community's mills, stores, postoffice mail routes and the only way since the defendant obstructed and destroyed the public road, for plaintiffs to or the members of their families, their friends, guests, or public to get to or from their home, is by traveling through the forest without any road or right of passway. . . . That by reason of the unlawful and wrongful flooding and submerging of the said public road leading down Cheoah River and up Santeetlah Creek to plaintiffs' premises, plaintiffs for many months have been compelled to remain in an isolated condition and at a great loss of time and suffering have been compelled to travel across a rough mountainside and top with nothing but a rough foot-path over which to travel, in order to get provisions, medicine, or their mail or any communication with other neighbors, to plaintiffs' great damage to the extent of $500. That by reason of the defendant's wrongful and unlawful blockading, obstructing and flooding of said public road and the plaintiffs' only roadway, the plaintiffs' land and premises have been damaged in a large sum which they estimate at $4,000." Demand for damages.

The defendant is a corporation engaged in the production of hydroelectric power. As a defense it alleges: "That it entered into a contract with the road authorities of Graham County by the terms of which it agreed to build and construct a road above the line of its proposed reservoir of the width and grade therein specified and that the said road authorities of Graham County agreed upon the construction of said road and that they would abandon said roads which were to be flooded by the said reservoir; and that this defendant then complied with said contract, and that the said road authorities did abandon said roads, and that there were no public roads leading to or near plaintiffs' land, as alleged in the complaint, at the time of the flooding thereof by this defendant. . . . It admits that it has flooded certain property belonging to it in the Santeetlah reservoir, but says that it has not entered upon or obstructed or blockaded or destroyed any public road, and that it had in no way trespassed on the property or premises of these plaintiffs."

The plaintiffs replying say that there has never been any abandonment or discontinuance of the road mentioned in a legal manner by the proper authorities.

The evidence tended to show that plaintiffs owned a farm in Graham County, N. C., where they and their families resided, near the Santeetlah Creek in Yellow Creek Township. The evidence of plaintiff George Colvin was to the effect: "I know where the Santeetlah Dam is located. It is about a mile and a quarter below the mouth of Santeetlah Creek on the Cheoah River. It is about a mile and a quarter from the mouth of Santeetlah Creek to the mouth of Watauga Branch and about a half mile from the mouth of the branch up the branch to where I live. There were roads leading to the property before the dam was constructed and the water impounded. There was a wagon road from my house to the Santeetlah Road which was used by myself and others. . . . The road up Santeetlah Creek was used by the public and was a good road. . . . I have known it for some twenty years. . . . The gates were closed in the dam about the 7th of December, 1927. The water impounded by the closing of the gate covered the road up Santeetlah Creek and up Watauga Branch to possibly 400 yards of our line. The entire road up Santeetlah Creek is flooded. I do not now have any means of ingress or egress from my property except by pathway, either walking or riding a horse. This pathway leads below the dam. I own a wagon and team, and before the dam was constructed traveled by wagon from my house to Robbinsville. The road up Santeetlah Creek was kept up by a road overseer and hands."

This evidence was corroborated by several witnesses. It was in evidence that the road leading up Watauga (Watoogah) Branch was opened up about 1887 or 1888, to move timber and a right of way obtained for that purpose and "was used continuously by the people who lived on the branch and anybody else who wanted to go up and down on it." It was in evidence that the highway commissioners of Yellow Creek Township never, in meeting assembled, authorized the road in controversy to be closed or discontinued. It is admitted by defendant that prior to 1910 and up to 5 December, 1927, there was a public road known as the Santeetlah Road running up and down Santeetlah River.

The issues submitted to the jury and their answers thereto were as follows:

"1. Are the plaintiffs, George Colvin and Riley Colvin, the owners of an interest in the lands described in the complaint? Answer: Yes.

2. If so, what interest are said plaintiffs the owners of? Answer: Entire.

3. Did the defendants, the Tallassee Power Company, diminish the value of said lands by flooding the roads leading to and from said lands? Answer: Yes.

4. If so, was said diminution by the defendant, Tallassee Power Company wrongful? Answer: Yes.

5. What amount, if any, are the plaintiffs, George Colvin and Riley Colvin, entitled to recover of the defendant, Tallassee Power Company? Answer: $1,400."

The other necessary evidence will be set forth in the opinion.

Morphew & Morphew and T. M. Jenkins for plaintiffs.

R. L. Smith, S. W. Black, R. L. Phillips and Bryson & Bryson for defendant.

CLARKSON, J. At the close of plaintiffs' evidence and at the close of all the evidence defendant made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled the motions, and in this we can see no error.

The questions involved: First, Was the obstruction and flooding by the defendant of the roads which gave plaintiffs ingress and egress to their land wrongful? We think so.

It is admitted by defendant that prior to 1910, and up to 5 December, 1927, there was a public road, known as the Santeetlah Road, which led into the old State Turnpike Road at Stump Ford, which traversed Graham County by Robbinsville. As to the road up Watauga (Watoogah) Branch which plaintiffs used to travel from their home to the Santeetlah Road, thence to the Turnpike, the main public highway, plaintiffs claimed an easement by adverse user, which defendant disputed. These two roads were flooded by defendant up to within 400 yards of plaintiffs' home and prevented plaintiffs ingress and egress over them to the main public highway.

A legal question arises as to the closing of the Santeetlah Road. Defendant claimed that they had a contract with the commissioners of Graham County and the road commissioners of certain townships whereby this public road that existed up to this time, under certain conditions, would be abandoned and flooded. The agreement was made 2 February, 1920. We need not discuss this agreement on the minutes of the board of county commissioners of Graham County, as the record discloses that the road in controversy was in Yellow Creek Township.

We find in Public-Local Laws, 1919, ch. 197, part sec. 5, the following: "Said highway commission shall have the same supervision, powers and rights in respect to all public roads and bridges in Yellow Creek Township as has heretofore been vested in the board of county commissioners of Graham County," etc.

The record evidence discloses that there was no legal meeting of the highway commission of Yellow Creek Township to discontinue this road. *O'Neal v. Wake County,* 196 N. C., 184. Of course it goes without saying that if there had been a legal meeting the discontinuance of the road had to be governed by the law in such cases. In the minutes of the board of commissioners of Graham County, held years after 5 December, 1927, we find the following, which recognized the power in the highway commission of Yellow Creek Township: "Whereas, since the passage of the above resolutions and orders (2 February, 1920) the highway commission of Yellow Creek Township has been abolished and its authority vested in the board of county commissioners of Graham County, which takes the place of and has all the authority heretofore conferred upon the highway commission of Yellow Creek Township." On 5 December, 1927, the board of county commissioners of Graham County, after making certain recitals, passed the following: "Do hereby collectively and severally condemn and abandon and turn over to said company all their rights, title and interest in and to all those parts of the present public roads or any public roads which have been constructed by them or any or under their authority or jurisdiction of them within the flooded areas, and do hereby authorize the closing of and the disuse of said roads and do hereby authorize and empower said company to flood same."

The record discloses that no petition was filed or notice given or hearing had. On 2 January, 1928, the board of county commissioners of Graham County passed a resolution rescinding and annulling the resolution of 5 December, 1927. The resolution reciting: "It appears that no petition has been filed for closing or abandoning any of the said public roads affected by said order, and that no notice of the same has been given, and that no public hearing has been given for the purpose, as this board has since been informed and advised is required by law." The board of county commissioners of Graham County that passed it rescinded it, and thought it illegal, and we are of the same opinion.

In regard to the road up Watauga Branch, which did not go through but by plaintiffs' land, and which was used for ingress and egress—we think the evidence sufficient to go to the jury as to adverse user. It was in evidence that this road was built and opened up about 1887 or 1888 to move timber and a right of way obtained and plaintiffs and those under whom they claim have used the road and it has been worked by those who used it and been used by the public in general ever since. The right of way was given to move timber off the land now owned by plaintiffs and others, and used for that purpose and continuously used ever since. "From that time on the road up Watauga Branch was used continuously by the people who lived on that branch and anybody else who wanted to go up and down it." The record discloses that in all the years since 1887 or 1888 no landowner through whose land this road ran made any objection to its use by plaintiffs or others.

On this aspect the court below charged: "We come now to determine was there an adverse user for the requisite period, and in this connection the court charges you as a matter of law that to establish adverse use there must be of the roadway sought to be shown as a private way, a clear, definite, positive and notorious use thereof. Such use must be continuous, adverse, hostile and exclusive during the entire statutory period of twenty years, with an intention on the part of the user to claim a private way over the lands over which such roadway ran. A use by permission or license for such period would be insufficient to establish a private way, and any other use other than an adverse use would likewise be insufficient, the use must be with the intent to hold to the exclusion of others, and not by sufferance of others."

We think the charge is in accordance with the law in this jurisdiction. In *Gruber v. Eubank,* 197 N. C., at p. 285, it is said: "The legal essentials for creating an easement by prescription are thus stated in 9 R. C. L., 772: 'To establish an easement by prescription it must be, first, continued and uninterrupted use or enjoyment; second, identity of the thing enjoyed; third, a claim of right adverse to the owner of the soil, known to and acquiesced in by him.' *Draper v. Conner,* 187 N. C., 18, 121 S. E., 29; *Durham v. Wright,* 190 N. C., 568, 130 S. E., 161."

The fact that in going over the road at some period bars had to be laid down was for the jury to consider on adverse user.

In *Grant v. Power Co.,* 196 N. C., at p. 619, speaking to the subject: "It is well settled, of course, in this State, that the right to a private way over and across the land of another may be acquired as against the owner of the land, by a continuous adverse use for twenty years, and that a mere user for the required period is not sufficient to confer the right."

Second. Can plaintiffs maintain an action against defendant for damages resulting from the wrongful obstruction of said roads? We think so.

The following principle is applicable in this action—13 R. C. L., "Highways," p. 231, part sec. 195: "It is generally held that one whose means of ingress to and egress from his property is completely cut off by an obstruction suffers a special injury, different from that suffered by the public at large, as, for example, where the obstructed way affords the only means of getting to market with the products of his adjoining farm. It is not material whether access is completely cut off from every point, or whether the obstruction merely cuts off the means of reaching particular places with which it is necessary or advantageous for the plaintiff to communicate."

This question was not directly presented in the *Grant case, supra,* but the opinion cites the principle above enunciated, as taken from 29 C. J., at pages 631 and 632, as follows: "It is said that an action for damages against one who injures a public highway may be maintained by a private person, if he has sustained special damages, differing not merely in degree, but in kind from that suffered by the community at large, as where access to plaintiff's property is cut off. Many decisions are cited in support of the text. As the question is not presented on this appeal, we do not decide it. It would seem, however, that plaintiff sustained special damages in this case, caused by defendant's flooding the road and cartways upon which he was dependent for access to his land." *Grant case, supra,* p. 619.

In the present action plaintiffs and their families are marooned far up on the mountain side by defendant flooding the roads. The roads heretofore used for ingress and egress for over forty years by plaintiffs and those under whom they claim, covered with water to within 400 yards of plaintiff's land, cutting off their ingress and egress to the main turnpike highway. The Santeetlah public road totally submerged with water and plaintiffs' private way also covered with water for some distance. The court below gave a most minute and detailed charge covering the law on every phase of the evidence. The contentions were given fairly to both sides.

We have examined the exceptions and assignments of error made by defendant, to admission and rejection of evidence, to refusal to submit issues tendered by defendant and to the charge of the court, and can find no prejudicial or reversible error.

No error.

THE BANK OF DALLAS ET AL. v. W. F. McCANLESS.

(Filed 10 September, 1930.)

Assignments C a—Party accepting assignment unconditionally is liable to assignee for all moneys in his hands due assignor.

Where the subcontractor for the construction of a highway assigns all payments that become due to him from the contractor to a bank as security for loans, and the contractor unconditionally accepts the assignment: *Held,* the contractor by his unconditional acceptance of the assignment is liable to the assignee bank to the extent of all moneys in his hands due the subcontractor, to the extent of the subcontractor's debt to the bank, and upon the subcontractor's abandonment of the work and its completion by the contractor at a loss the contractor may not deduct the amount expended by him to complete the contract, the rights of the parties being determined by the written agreements, and equities between the parties having no application. Acceptances upon condition of the completion of the work distinguished by BROGDEN, J.

CIVIL ACTION, before *Clement, J.,* at February Term, 1930, of GASTON.

By consent the cause was referred to Honorable A. C. Jones. The findings of fact made by the referee are to the effect that on 25 July, 1922, the defendant entered into a contract with the State Highway Commission "to provide and furnish all materials, machinery, improvements and tools, and perform all work and labor required to construct and complete a certain highway known as the State Highway Project No. 630-B." Thereafter on 8 March, 1923, the defendant "employed A. S. Mowry to do and perform the work, furnish all tools, labor and materials for laying the asphalt, or Topeka top surface for said project No. 630-B for the consideration of ninety-seven cents per square yard of finished top surface of asphalt accepted by the State Highway engineer, the payments for same to be made monthly within two days after the receipt of estimate of the State Highway Commission for the work done during the preceding calendar month; a deduction was to be made from each payment, by the defendant, of ten per cent of the price per square yard of asphalt, or Topeka top surface, to be retained by defendant as a retained percentage, and to be paid to the said A. S. Mowry within thirty days after the completion of the said work and its acceptance by the said Commission." Mowry assigned the contract to Mowry Construction Company, a corporation, "subject to the terms and conditions of the contract between the defendant and A. S. Mowry."

On the .... day of June, 1923, the Mowry Construction Company delivered to the plaintiff, Bank of Dallas, the following instrument in writing: "Know all men by these presents, that the Mowry Construction Company, a corporation organized under the laws of the State of North Carolina, in consideration of the sum of one dollar, and the consideration hereinafter mentioned, has assigned, transferred and set over, and by these presents does assign, transfer and set over unto the Bank of Dallas, North Carolina, all sums which may now be due, or which may hereafter become due from W. F. McCanless, of Charlotte, N. C., under a certain contract made between the said W. F. McCanless and the said Mowry Construction Company for the laying of asphalt concrete on a State highway project known as No. 630-B, comprising approximately 67,000 yards of asphalt concrete, for which the said W. F. McCanless has agreed to pay the said Mowry Construction Company the sum of 97 cents per square yard.

This assignment is made as security to indemnify the said Bank of Dallas for any loan or advances which it may hereinafter make to the said Mowry Construction Company; and the said W. F. McCanless is hereby authorized and directed to pay over to the said Bank of Dallas any and all sums which may hereinafter become due and owing from him to the said Mowry Construction Company, and the said Bank of Dallas is hereby authorized to sign on behalf of the said Mowry Construction Company any receipts or acknowledgments for such payments.

In witness whereof, the said Mowry Construction Company has caused these presents to be executed in its name by its president and attested by its secretary, and its corporate seal to be hereto affixed, all by order of its board of directors." Mowry Construction Company. By A. S. Mowry, Pres."

The defendant accepted said assignment in the following words: "I, W. F. McCanless, do hereby agree to pay over any and all sums which may become due the said Mowry Construction Company under contract for paving known as Highway Project No. 630-B, as directed by the said Mowry Construction Company in the foregoing assignment." W. F. McCanless."

Upon the foregoing facts the referee found that the defendant had in his hands, subject to the claim of plaintiff bank, the sum of $16,181.66, and that the defendant was liable to plaintiff for the amount of the note, to wit, $12,500. The defendant filed exceptions to the report of the referee and the matter was duly heard by the trial judge, who partially sustained the exception of defendant to finding of fact No. 18 to the effect that the sum of $16,181.66 was a security for the payment of $12,500 note held by the plaintiff, for that said sum of $16,181.66 received by the defendant for work done by Mowry Construction Company "was subject to all costs and expenses incurred by the defendant in completing the project after the same had been abandoned by the Construction Company as aforesaid." The trial judge further sustained the exception of defendant to finding of fact No. 19 and modified said finding to read as follows: "Unpaid balance due the Bank of Dallas by the Mowry Construction Company, $12,500, but such amount is not an indebtedness against the defendants, because there was nothing due the Mowry Construction Company after the completion of the project by the defendant which was abandoned by the Mowry Construction Company." The trial judge further sustained the exception of defendant to conclusion of law No. 6 for the reason that there was nothing due Mowry Construction Company after costs and expenses of completing the project were satisfied and accounted for.

Whereupon, it was ordered and adjudged "that the plaintiff Bank of Dallas recover nothing of defendant in this action."

From the foregoing judgment the plaintiff appealed.

R. G. Cherry, C. D. Holland and L. B. Hollowell for plaintiff.

Mangum & Denny for defendant.

BROGDEN, J. What are the rights of the parties upon an assignment of payments to become due on a road contract, duly made by a subcontractor to a bank furnishing money for said project to such subcontractor, when the assignment is unconditionally accepted by the contractor, and thereafter the subcontractor, after properly completing a major portion of the work, abandons the contract and the contractor proceeds to finish the work at a loss?

Various aspects of assignments have been discussed in the books and by appellate courts, but the question of law in this case involves the rights of the assignee of a defaulting subcontractor, against the contractor, who accepted the assignment and agreed to pay according to the terms thereof. Hence, equities arising from the relationship of assignee, assignor and acceptor play no part for the reason that the written instruments state the explicit engagements of the parties. Therefore, the correct interpretation of the written agreements determines the rights of the parties upon this particular record.

It is disclosed that the subcontractor, assignor, executed and delivered notes to the plaintiff bank in pursuance of the assignment and acceptance. The wording of the acceptance signed by the defendant is unconditional. The assignment directs the defendant "to pay over to the said Bank of Dallas any and all sums which may hereafter become due and owing from him to the said Mowry Construction Company," and the defendant expressly engages "to pay over any and all sums which may become due to said Mowry Construction Company under contract for paving known as Highway Project No. 630-B, as directed by the said Mowry Construction Company."

An analogous situation arose in the case of *Snow v. Commissioners,* 112 N. C., 335, 17 S. E., 176. In disposing of the rights of the parties in that case the Court said: "The effect of the arrangement between these parties was as if Brewster had drawn a draft on Ellington, Royster & Co. in favor of Snow for the sum mentioned in the note, to be paid out of the contract price, and Ellington, Royster & Co. had accepted the draft." Likewise in the case at bar the unconditional language of the assignment and acceptance works out a result imposing liability upon the defendant.

The various rights of assignees, assignors and acceptors in construction contracts, where default occurred, are discussed in the following cases: *Salt Lake City v. O'Connor et al.,* 249 Pac., 810, 49 A. L. R., 941; *O'Connell v. Root,* 150 N. E., 160; *Weber v. Wilson,* 215 N. W., 674; *Fidelity and Deposit Co. v. City of Auburn,* 272 Pac., 34; *Norton v. MacAtee & Sons,* 16 S. W. (2d), 517; *Twentieth Street Bank v. Summers,* 110 S. E., 478; *Jefferson County Savings Bank v. J. C. Car-*

land, 77 Southern, 704; *Finklestein v. Morse,* 115 N. E., 667; *Lynip v. Alturas School District,* 141 Pac., 835.

Under these decisions, if the acceptance of the assignment was conditional, that is to say, if the wording of the acceptance is to the effect that the payments are conditioned upon the completion of the work in a proper and satisfactory manner, then in such case the rights of the assignee would be subject to the rights of the contractor who was compelled to complete the project. Upon the other hand, if the acceptance is unconditional and constitutes a promise to pay the assignee all funds coming into the hands of the contractor, then the assignee is entitled to recover in an amount, of course, not exceeding the funds in the hands of the contractor.

A reasonable construction of the assignment and acceptance leads unerringly to the conclusion reached by this Court in the *Snow case, supra.* See, also, *Hall v. Jones,* 151 N. C., 419, 66 S. E., 350; *Insurance Co. v. Board of Education,* 194 N. C., 430, 140 S. E., 31; *Trust Co. v. Construction Co.,* 191 N. C., 664, 132 S. E., 804.

Reversed.

RICHARD FREDERICK LANE, A MINOR, BY HIS NEXT FRIEND AND FATHER, RICHARD LANE, v. MALLIE J. PASCHALL, TRADING AS PASCHALL'S BAKERY, AND REUBEN KELLY.

(Filed 10 September, 1930.)

1. **Trial D a—Motion of nonsuit must be renewed at close of all evidence in order to present question of sufficiency of evidence for review.**

   In order for a defendant to have a case reviewed on appeal for insufficiency of the plaintiff's evidence, his motion as of nonsuit must be renewed at the close of all the evidence, C. S., 567, or he should in apt time offer a special prayer for an instruction directing a verdict in his favor. C. S., 565. *Semble,* in this case there was sufficient evidence to take the case to the jury. *Sutton v. Melton,* 183 N. C., 369.

2. **Trial B e—Trial court has the power to withdraw incompetent question from evidence and instruct jury that it not be considered.**

   Where on cross-examination of the defendant the counsel for the plaintiff asks an incompetent, prejudicial question, the trial court has the power in his sound discretion to grant a new trial or to withdraw the question from the evidence and instruct the jury not to consider it, and where he withdraws the question from the evidence and emphatically instructs the jury that the question not be considered, his refusal of defendant's motion for a new trial will not be held for error.

APPEAL by defendants from *Small, J.,* and a jury, at February Term, 1930, of BEAUFORT. No error.

This is an action for actionable negligence brought by plaintiff against the defendant. The evidence on the part of plaintiff was to the effect that Richard Frederick Lane, a negro boy about 16 years of age, was employed in defendant Paschall's bakery, and his work consisted of sweeping the floor and cleaning a dough brake machine. On 22 May, 1928, he was injured, and testified as to the occurrence as follows: "The machine sets in a frame with two rollers on top one another; the bottom roller was the one I had to clean. They are made out of steel. The machine was operated with electricity. There was a motor on the floor beside the machine, and had a lever on the side of the wall. I pulled the lever when I went to cut it off and put it up when I wanted to start it. Standing before the machine I could not reach the lever. In May, 1928, they had me running dough through the machine. I got $10 a week. When I was hurt the machine was in operation. I was cleaning the bottom roller. The bottom roller had to be cleaned because dough caked on it. That bottom roller has some ridges. It was my regular job to clean the machine. Mr. Kelly told me to do it. They told me to clean it when it was running. I cleaned it with a scraper. I had a regular scrape to clean it with. Mr. Kelly told me how to do it that way. I did not clean the upper roller with a scraper. The upper roller had a guard to clean it with. They told me to stand in front of the machine and to run across that roller while it was running, and that would knock the dough off. I was sixteen at the time I was hurt. I was cleaning the machine and it was running, and when I got about the middle way the first thing I knew my hand was right up between the roller. My hand was between the roller. I hollered for Mr. Kelly to come and stop the machine. When I pulled my hand out the skin was busted—hanging down. I could see the bone. My hand was straight before that time. I was carried to the hospital and was there about six weeks."

The defendant Paschall testified in part: "I told him to clean it from underneath the bottom roller. I told him two ways that it could be cleaned in perfect safety; that he could clean it from the top, providing it was not running, but if it was running it was perfectly safe to clean it from underneath. . . . There is ample room to get down under the pan and clean the roller. The switch is located within one foot of the wall and to the left of the machine. You can reach the switch when standing to the side to clean the roller. That is the scrape that we used to clean the machine at that time. It is impossible for a man's hand to get caught when cleaning the roller from underneath. I showed the plaintiff how to clean the machine before he ever scraped it. During the twelve months before he was hurt, I stopped him at least a dozen times from cleaning the machine above the lap or pan while it was running. I got down on my knees and showed him how to do it."

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: No.

3. What damage, if any, is plaintiff entitled to recover by reason of the negligence of the defendant? Answer: $2,000."

MacLean & Rodman and J. Grover Lee for plaintiff.
Brawley & Gantt for defendants.

CLARKSON, J. The defendant, at the close of the plaintiff's evidence, made motion for judgment as in case of nonsuit. The motion was overruled and defendant excepted. Defendant did not renew his motion at the close of all the evidence, C. S., 567, nor did defendant, under C. S., 565, at the close of all the evidence in apt time request the court in writing to instruct the jury that in view of all the evidence the first issue should be answered "No," and the second issue "Yes." We think defendant is precluded from raising the question that the evidence on the part of the plaintiff was not sufficient to be submitted to the jury. *Penland v. Hospital, ante,* 314. Of course, this does not militate against material exceptions and assignments of error as to admission or exclusion of evidence or errors in the charge of the court. The record discloses "The judge, in his charge to the jury, gave the contentions of both plaintiff and defendants, and charged the law arising upon same." Notwithstanding the defendant has waived his right to raise the question, yet we think the evidence sufficient to be submitted to the jury. *Holt v. Mfg. Co.,* 177 N. C., 170; *Boswell v. Hosiery Mills,* 191 N. C., 549; *Mahaffey v. Furniture Lines,* 196 N. C., 810; *Mills v. Mfg. Co.,* 198 N. C., 145; *Gibson v. Cotton Mills,* 198 N. C., 267.

In *Sutton v. Melton,* 183 N. C., at p. 372, it is said: "It is the duty of a master who employs a servant in a place of danger to give him such warning and instruction as is reasonably required by his youth, inexperience, and want of capacity, and as will enable him, with the exercise of ordinary care to perform the duties of his employment with reasonable safety to himself," citing numerous authorities.

One may know the facts, yet not understand the danger and risks that threaten him. This is especially so with those of immature years. Then again, to subject a youth to cleaning a machine unguarded, knocking dough off the lower roller while in motion, a space between the rollers that caught the dough could catch a hand in the cleaning, these are elements to be considered by the jury on the question of negligence and contributory negligence.

There is no exception and assignment of error to the charge, and it is not set out in the record, but it is admitted by the defendant and the law also presumes that the court below instructed the jury on the law applicable to the facts.

Defendants excepted and assigned error to the following cross-examination of defendant Paschall: "Q. I ask you if it isn't a fact that after this boy was hurt in your employ your insurance company canceled your insurance on the ground that you were employing too young and too cheap labor at this very machine? By the court: Gentlemen of the jury, do not consider that question at all as evidence of any kind whatever. Defendant asks that the jury be sent out at this time for a motion by defendant, and the jury is sent to their room. Defendant moved the court to withdraw a juror and declare a mistrial. By the court: Gentlemen of the jury, as to the question just asked by counsel for the plaintiff, and the court told you, gentlemen, to step into your room, the court told you not to consider it as any evidence in any way, shape or form. Dismiss it from your mind and erase it from your memory; that is your duty, and I so instruct you."

Defendant contended that it was error in the court below not to allow his motion to withdraw a juror and declare a mistrial, citing *Allen v. Garibaldi,* 187 N. C., 798. In that case the court below sustained defendant's objection, but the motion for a new trial was not requested until after verdict. The Court said, at p. 800: "Without deciding upon the merits of these opposing contentions, we think the defendant's motion for a new trial, after verdict, upon the ground stated, must be overruled. The court sustained the defendant's objection, and this was all he was asked to do at the time. There was no motion for a mistrial, or *venire de novo,* because of these alleged improper questions. Defendant elected to proceed with the trial and to take his chances with the jury as then empaneled. Indeed, it appears that counsel for both sides, during the argument, cautioned the jury to disregard the suggestion of liability insurance, as there was no evidence in the case tending to show its existence. Evidently the defendant did not consider it of sufficient importance on the trial to ask that a juror be withdrawn and a mistrial entered."

In the present case, the court not only sustained defendants' objection, but in the most emphatic language told the jury, "Dismiss it from your mind and erase it from your memory; that is your duty, and I so instruct you." We think it was in the sound discretion of the court below to either grant a new trial or charge the jury as was done. *Holt v.*

Mfg. Co., supra; Gilland v. Stone Co., 189 N. C., 783; *Fulcher v. Lumber Co.,* 191 N. C., 408; *Smith v. Ritch,* 196 N. C., at p. 78.

The other exceptions and assignments of error present no new or novel proposition of law, and we think there is no merit in them. In law we find

No error.

ELIZABETH KEYS v. J. A. TUTEN ET AL.

(Filed 10 September, 1930.)

1. **Husband and Wife D d—Where husband has abandoned wife she may convey her property without his consent under C. S., 2530.**

   There is no constitutional inhibition on the Legislature to declare by statute when and how a wife may become a free trader, and notwithstanding the provisions of Article X, section 6, to the effect that a married woman may convey her separate realty with the written consent of her husband, the provisions of C. S., 2530, making her a free trader upon the abandonment of her husband and authorizing her to convey her real estate without his consent, is valid, and in such cases, C. S., 2509, requiring the execution of her deed by her husband and her separate examination taken, does not apply.

2. **Same—In this case held: evidence that husband had abandoned wife before her execution of her deed should have been submitted to jury.**

   In order for a wife abandoned by her husband to become a free trader under C. S., 2530, it is not necessary that the wife be abandoned for the statutory time necessary to constitute grounds for divorce, and where, in an action by her to set aside her deed executed without the written consent of her husband, the defense is set up that at the time of its execution she had been abandoned by her husband, and pleadings in her action for divorce alleging abandonment at the time are introduced in evidence: *Held,* the issue of abandonment should be submitted to the jury even though abandonment was not an issue in the divorce proceedings, and the granting of a judgment on the pleadings in her favor is error.

3. **Evidence L a—Where divorce is granted for adultery, allegations of abandonment will not estop plaintiff from denying abandonment in another action.**

   Where, in an action by a married woman to set aside her deed to her separate realty on the ground that the written consent of her husband was not obtained, the defense is set up that at the time she executed the deed she had been abandoned by her husband, C. S., 2530, and pleadings in her prior action for divorce, alleging abandonment, are introduced in evidence: *Held,* the wife is not estopped by the pleadings in the divorce proceedings from denying that she had been abandoned when abandonment was not an issue therein, but the allegations may be taken as some evidence of abandonment in the action to set aside her deed.

APPEAL by defendants from *Cranmer, J.*, at May Term, 1930, of BEAUFORT. Error and remanded for new trial.

Action to have timber deed executed by plaintiff adjudged void, and ordered canceled, on the ground that at the date of its execution, plaintiff was a married woman, and that her husband did not join with her in the execution of said deed, or assent thereto in writing, in accordance with the provisions of section 6 of Article X of the Constitution of North Carolina.

Defendants in their answer admit the allegations of the complaint with respect to the execution of said timber deed; they allege, however, that at the date of its execution, her husband was not living with the plaintiff, having theretofore abandoned her. Defendants rely upon the provisions of C. S., 2530.

In support of their allegation that plaintiff's husband had abandoned her prior to the date of the execution of said timber deed, defendants allege that plaintiff executed said deed on 25 October, 1928; that on 26 October, 1928, plaintiff instituted in the Superior Court of Beaufort County an action for an absolute divorce from her husband; that this action was tried at December Term, 1928, of said court; and that at said term a judgment and decree was rendered in said action, dissolving the bonds of matrimony theretofore existing between plaintiff and her husband.

In the complaint in said action for divorce, plaintiff alleged that during the year 1926, because of his cruel treatment of her, plaintiff left the home of her husband, and has since resided in the home of her mother. The ground upon which she prayed for divorce was adultery committed by her husband during the year 1927. No facts are alleged in said complaint upon which she prayed for or was entitled to an absolute divorce on ground of abandonment. C. S., 1659, sec. 4. The complaint was duly verified by the plaintiff, on 26 October, 1928, as required by the statute. C. S., 1661.

The court was of opinion that, upon the admissions in the answer of the defendants, the timber deed executed by plaintiff is void, for the reason that her husband did not assent thereto in writing; that the judgment and decree in the action for divorce did not estop plaintiff from denying that her husband had abandoned her prior to the date of the execution of said deed, and that notwithstanding the record in said action for divorce, plaintiff is entitled to judgment on the pleadings in this action.

From judgment in accordance with the opinion of the court, defendants appealed to the Supreme Court.

L. M. Scott and H. C. Carter for plaintiff.

Chas. L. Abernethy, Jr., and John H. Bonner for defendants.

CONNOR, J. The Constitution of this State provides that the real and personal property of a married woman "may be devised and bequeathed, and, with the written assent of her husband, conveyed by her, as if she was unmarried." Article X, section 6, Const. of N. C.

It is provided by statute in this State that no conveyance by a married woman of "any freehold estate in her real property shall be valid, unless the same be executed by her and her husband, and proved and acknowledged by them, and her free consent thereto appear on her examination separate and apart from her husband, as is now or may be required by law in the probate of deeds of *femes covert.*" C. S., 2509.

However, it is further provided by statute that every woman whose husband has abandoned her, shall be deemed a free trader so far as to be competent to contract and be contracted with, and to bind her separate property. "She may also convey her personal estate and her real estate without the assent of her husband." C. S., 2530.

The validity of C. S., 2530, notwithstanding the provisions of section 6 of Article X of the Constitution, has been sustained by the decisions of this Court, upon the ground, as stated by *Faircloth, C. J.,* in *Hall v. Walker,* 118 N. C., 377, 24 S. E., 6, that "there is no constitutional inhibition upon the power of the Legislature to declare where and how the wife may become a free trader. Article X, section 6, was not intended to disable, but to protect her." In *Bachelor v. Norris,* 166 N. C., 506, it is said: "The constitutionality of the statute authorizing a married woman to execute a valid conveyance of real property without the joinder of her husband, when she has been abandoned by her husband, has been sustained in several decisions of this Court. *Hall v. Walker,* 118 N. C., 377, 24 S. E., 6; *Brown v. Brown,* 121 N. C., 8, 27 S. E., 998; *Finger v. Hunter,* 130 N. C., 531, 41 S. E., 890." See, also, *Vandiford v. Humphrey,* 139 N. C., 65, 51 S. E., 893, where it is held that a wife, abandoned by her husband, may convey her land, without his written assent, notwithstanding that at the date of the conveyance, sufficient time has not elapsed from the date of the abandonment for the commencement by her of an action for divorce on the ground of such abandonment. In that case it was insisted that the power of the wife to contract in regard to her separate property as a free trader, is to be tested by her right to maintain an action for divorce for like cause. In the opinion for the Court, it is said: "This, we think, a safe test, but counsel further insist that until the time has elapsed entitling her to bring the action she should not be permitted to make contracts. This construction, we think, would, to a very great extent, destroy the beneficent purpose of the statute."

Counsel for appellee, in their brief filed in this Court, concede that it was error for the court to adjudge, on the pleadings, that the timber deed is void, and that for this error defendants are entitled to a new trial, at which an issue, raised by the pleadings, with respect to the abandonment may be submitted to a jury. Defendants, however, contend that there was error in the refusal of the court to hold that plaintiff is estopped by the record in the action for divorce to deny that her husband had abandoned her at the date of the execution of the timber deed. This contention cannot be sustained. No issue was raised by the pleadings in the action for divorce with respect to the abandonment as alleged in this action. Plaintiff did not allege in her complaint, as a ground for divorce that her husband had abandoned her. For this reason, the cases cited and relied upon by defendants are not applicable. The record in the action for divorce, while not conclusive, is competent as evidence upon the issue involving the allegation in the complaint in this action as to the abandonment.

For the error conceded by appellee, the judgment is reversed. The action is remanded to the Superior Court of Beaufort County for a new trial. Defendants are entitled to have the issue raised by their answer submitted to and determined by a jury.

Error and remanded.

JULIEN WOOD ET AL. v. THE CITIZENS BANK, ADMINISTRATOR, ET AL.

(Filed 10 September, 1930.)

1. **Appeal and Error J c—Findings of fact of referee supported by evidence and approved by trial court are conclusive on appeal.**

   The findings of fact of a referee upon sufficient evidence, approved by the trial court are conclusive on appeal to the Supreme Court.

2. **Principal and Surety B b—Where county treasurer uses embezzled funds to pay county debt the one whose funds were embezzled may recover from county, and surety on treasurer's bond is liable.**

   Where the treasurer of a county embezzles funds of a bank of which he is cashier and uses them to cover his embezzlement of county funds by paying a lawful obligation of the county therewith, the bank may trace and recover its funds thus purloined, and the surety on the bond of the county treasurer is liable for the deficit thus created in the county funds.

APPEAL by defendant, Maryland Casualty Company, from *Small, J.*, at March Term, 1930, of CHOWAN.

Civil action by the commissioners of Chowan County to recover of the Citizens Bank, Inc., administrator of the estate of W. H. Ward, deceased treasurer of Chowan County, and the Maryland Casualty Company, surety on his official bonds, the sum of $17,733.56, alleged shortage in the official accounts of the said deceased treasurer (reported on first appeal, 197 N. C., 410, 149 S. E., 380).

The Maryland Casualty Company contends that $10,265.00 of this amount is not properly chargeable against the official accounts of the deceased treasurer, but represents a claim of the Citizens Bank, Inc., against the estate of W. H. Ward, deceased, who was also assistant cashier of said bank at the time of his death, for moneys borrowed or misappropriated by him as its assistant cashier and used to discharge, in part, his obligations to the county.

The Citizens Bank, Inc., on motion of the Maryland Casualty Company, was made a party defendant, and in its answer takes issue with this position of the surety.

A reference was ordered and the matter heard by F. E. Winslow, Esq., who found the facts and reported the same, together with his conclusions of law, to the court.

As bearing on the crucial point at issue, the referee found the following facts:

"22. The referee finds that W. H. Ward unlawfully misappropriated money of the Citizens Bank on 9 September, 1927, to the amount of $10,265.00, applied the money to the payment of a legal obligation of the county of Chowan due 10 September, 1927, and concealed his embezzlement by falsely carrying the amount, plus some other trifling amounts, in his cash items from day to day until his death.

"23. When the note due 10 September was paid as aforesaid Ward was then indebted to the county of Chowan in a sum exceeding the amount of said note for money which he had embezzled from the county fund, but the county officers were completely ignorant of this fact."

It was the conclusion of the referee, approved by the trial court, that the commissioners are entitled to recover of the administrator of the estate of W. H. Ward, deceased, the sum of $17,645.10 with interest at the rate of 12 per cent per annum (C. S., 357) from 10 February, 1928, as against the administrator, and from 19 May, 1928, as against the surety; and that the Maryland Casualty Company is not entitled to recover over against the Citizens Bank, Inc., in its corporate capacity, any part of this sum.

Upon exceptions duly filed to the report of the referee by the Maryland Casualty Company the same were overruled, while those filed by the commissioners were sustained, and from the judgment thus modifying and affirming the report, the Surety Company appeals, assigning errors.

W. D. Pruden for plaintiffs.
Privott & Privott for defendant Citizens Bank.
Manning & Manning for defendant Maryland Casualty Co.

STACY, C. J. On the findings of the referee, approved by the trial court, which are conclusive as they are not challenged for want of evidence to support them, we have discovered no exceptive assignment of error of sufficient merit to work a reversal of the judgment.

The two circumstances which differentiate this case from those cited and relied upon by appellant are, first, the fact that the $10,265.00 in question was embezzled from the bank by the deceased treasurer, and, second, the finding that said funds were used by the treasurer in his capacity as such to discharge county obligations.

It is well settled that where one's property has been purloined by actionable fraud or covin, the law permits him to follow it and to recover it from the wrongdoer, or from any one to whom it has been transferred otherwise than in good faith and for a valuable consideration, so long as it can be identified or traced; and the principle applies to money and choses in action as well as to specific property. *Proctor v. Fertilizer Co.,* 189 N. C., 243, 126 S. E., 608; *Mfg. Co. v. Summers,* 143 N. C., 102, 55 S. E., 522; *Edwards v. Culberson,* 111 N. C., 342, 16 S. E., 233. The pursuit of equity in this respect is stopped only when the means of ascertainment fail, or the rights of bona fide purchasers for value, without notice, intervene. *McNinch v. Trust Co.,* 183 N. C., 33, 110 S. E., 663.

Had the referee found that what Ward did with respect to the bank's funds amounted to a loan, a different question would have been presented. *Liles v. Rogers,* 113 N. C., 197, 18 S. E., 104; *Bank v. South Hadley,* 128 Mass., 503; *Bank v. New Castle,* 224 Pa., 285; *Pittsburgh v. Bank,* 79 Atl. (Pa.), 406.

Affirmed.

C. A. HONEYCUTT, BILTMORE BUILDERS' SUPPLY COMPANY AND TRUMBO & SON, INC., v. KENILWORTH DEVELOPMENT COMPANY, W. C. WEST AND WIFE, SERGUNIA WEST, J. F. HAZELRIGG AND J. C. MILLER.

(Filed 10 September, 1930.)

Laborers' and Materialmen's Liens A a—Where contractor is not owner and has no contractual relationship with owner, laborers' lien does not attach.

The right of laborers and materialmen to a lien upon a building is exclusively statutory, and the statute does not give a right of lien upon a lot where the principal contractor is not the owner and does not have any contractual relationship with the owner, and where by mistake a building is erected on the lands of another who has not contracted therefor or agreed thereto, the laborers and material furnishers have no statutory right of lien against him, and this result is not affected by the fact that the present owner of the title to the *locus in quo* acquired with knowledge of the facts.

CIVIL ACTION, before *MacRae, Special Judge,* at February Term, 1930, of BUNCOMBE.

The evidence tended to show that the Kenilworth Development Company owned a certain lot of land in Kenilworth, Buncombe County. This land had been subdivided into various lots. The defendants, West and Hazelrigg, purchased lot No. 13 of said subdivision, but inadvertently the purchasers thought they had purchased lot No. 7, Block-N of said development. Lot No. 7 belonged to the defendant, Kenilworth Development Company, and was situated some five or six lots from lot No. 13 purchased by West and Hazelrigg. Subsequently West and Hazelrigg undertook to build a house on lot No. 7. The plaintiffs furnished labor and material for said house. Honeycutt furnished material amounting to $493.31. The Biltmore Builders' Supply Company furnished material amounting to $939.22, and the amount furnished by Trumbo & Son was $237.64. Each of said materialmen duly filed a lien on said lot No. 7. The defendant Miller had also furnished material for said building. After the building was under construction the mistake was discovered and West and Hazelrigg approached the Kenilworth Development Company and requested said company to execute and deliver to them a deed for lot No. 7 in exchange for lot No. 13. The evidence further tended to show that on or about 30 August, 1928, Kenilworth Development Company executed a deed for lot No. 7 to West and Hazelrigg. This deed was never delivered because upon examination of the record it was disclosed that lot No. 13 was covered by a mortgage and thereupon Kenilworth Development Company refused to proceed any further with the exchange.

It further appears that the Kenilworth Development Company executed and delivered to the defendant Miller a deed for said lot No. 7, but it does not appear when this was done. It does appear, however, that at the time the conveyance was made to Miller that the Kenilworth Development Company knew that material liens were claimed against lot No. 7 and that Miller, the purchaser, knew the situation. Miller paid $1,200.00 for said lot No. 13.

There was also evidence to the effect that Miller had participated in a meeting with the materialmen and understood that West and Hazelrigg were undertaking to procure a deed from the Development Company for lot No. 7 before he purchased the same.

At the conclusion of the evidence the trial judge nonsuited the action as to Kenilworth Development Company and J. C. Miller, and directed the jury to answer the issues so that the materialmen secured judgment for the amount of their respective claims against West and Hazelrigg. The judgment further directed that the liens filed by the claimants on lot No. 7 be canceled.

From the foregoing judgment plaintiffs appealed.

Edward H. McMahan for Biltmore Builders' Supply Company.
Jos. W. Little for Trumbo & Son.
Merrimon, Adams & Adams for Kenilworth Development Company.

BROGDEN, J. The particular point presented by this appeal is whether the plaintiffs are entitled to a lien upon lot No. 7.

The defendant, Kenilworth Development Company, owned lot No. 7, but the record does not disclose any contract or agreement whatever between said Development Company and West and Hazelrigg who undertook to build a house thereon. In other words, West and Hazelrigg, through mistake, purchased building material and commenced the erection of a house on a lot which they did not own, and, therefore, there existed no contractual relation between West and Hazelrigg and the defendant Development Company. The plaintiffs furnished material for said building to West and Hazelrigg, and they were also ignorant of the mistake in the ownership of the lot.

The lien law of this State is C. S., chapter 49. The statute gives a lien upon "every building . . . together with the necessary lot on which such building is situated, etc." But neither the statute nor the decisions construing it, permit a lien to be filed on a lot upon which a third person has "squatted" or undertaken to erect a building without title thereto and without a contract or agreement express or implied with the owner thereof. *Weir v. Page,* 109 N. C., 220, 13 S. E., 773; *Nicholson v. Nichols,* 115 N. C., 200, 20 S. E., 294; *Weathers v. Cox,* 159 N. C., 575, 76 S. E., 7; *Brick Co. v. Pulley,* 168 N. C., 371, 84 S. E., 513; *Rose v. Davis,* 188 N. C., 355, 124 S. E., 576; *Lumber Co. v. Motor Co.,* 192 N. C., 377, 135 S. E., 115. Thus in *Foundry Co. v. Aluminum Co.,* 172 N. C., 704, this Court said: "The lien for labor done and materials furnished is given by statute to enforce the payment of a debt, and the general principle underlying the lien laws is that the relation of debtor and creditor must exist and that there can be no lien without a debt."

The question of law is discussed in a note appearing in 3 North Carolina Law Review, p. 62 *et seq.* In that article it is stated that the basis for establishing the relationship of creditor and debtor between the owner and materialman applies "where the principal contractor has (1) a contract with the owner to improve his land, or (2) where the owner has consented to such improvements."

In the case at bar the evidence does not disclose that West and Hazelrigg had any contract with the Kenilworth Development Company for building said house or that the Development Company procured or consented to the erection of a dwelling upon lot No. 7. The lien law in this State is exclusively statutory and no warrant of law appears justifying the enforcement of liens upon lot No. 7 upon the facts as now presented.

We therefore hold that the judgment of nonsuit was properly entered.

Affirmed.

STATE v. WRIGHT BYNUM AND WILLIAM RANDALL.

(Filed 10 September, 1930.)

Criminal Law L a—Appeal in capital cases will be dismissed for failure to prosecute according to Rules of Court, no errors appearing of record.

Whether the Supreme Court acquires jurisdiction of an appeal in *forma pauperis* from a conviction of a capital felony when the affidavit for leave to appeal fails to state, as required by C. S., 4651, that the "application is in good faith," *quære?* and where the appeal has not been prosecuted as required by the Rules of Court the appeal will be dismissed upon the motion of the Attorney-General after an examination of the record proper for errors appearing upon its face.

MOTION by State to docket and dismiss appeal.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

STACY, C. J. At the May Term, 1930, Wilson Superior Court, the defendants herein, Wright Bynum and William Randall, were tried upon an indictment charging them with the murder of one Callie Williford, which resulted in a conviction and sentence of death as to both of the defendants. From the verdict thus rendered and judgment entered thereon, the defendants gave notice of appeal to the Supreme Court, but this has not been perfected as required by the rules, in fact nothing has been done looking to this end.

As the attempted appeal is *in forma pauperis,* and the affidavit for leave to appeal without giving security for costs fails to state, as required by C. S., 4651, that "the application is in good faith," it may be doubted as to whether we have any jurisdiction to hear the matter. *S. v. Brumfield,* 198 N. C., 613. Nevertheless, as the case is a capital one, we have examined the papers and find no error on the face of the record proper.

The motion of the State must be allowed.

Appeal dismissed.

STATE v. AARON SHARPE AND BERRY RICHARDSON.

(Filed 10 September, 1930.)

MOTION by State to docket and dismiss appeal.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

PER CURIAM. This is a companion case to *State v. Bynum et al., ante,* 376, and what is said in that case applies equally to the instant one, the facts being substantially the same.

Appeal dismissed.

STATE v. PETER HARRIS AND NED HARRIS.

(Filed 10 September, 1930.)

Criminal Law L a—Where case is not docketed according to Rules of Court appeal will be dismissed.

Where the appellant in a criminal action has failed to have his case docketed in the time required by the Rules of Practice in the Supreme Court, in order to preserve his right to appeal it is required that he file an application for a *certiorari,* addressed to the sound discretion of the Supreme Court, and show a good and sufficient reason for granting his motion therefor, and where this has not been done the appeal will be dismissed upon motion of the State.

APPEAL by defendants from *Sinclair, J.,* at January Term, 1930, of EDGECOMBE.

Criminal prosecution tried upon an indictment charging the defendants with the murder of one Tom Cooper.

From a verdict of manslaughter and judgment entered thereon, the defendants appeal, assigning errors.

Motion by State to dismiss appeal.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

R. T. Fountain, T. W. Fitts and George M. Fountain for defendants.

STACY, C. J. This action was tried at the January Term, 1930, Edgecombe Superior Court, which commenced 20 January and ended five days thereafter. The case on appeal was docketed here 20 August, 1930. There was no application for a writ of *certiorari* at the next succeeding term of the Supreme Court commencing after the rendition of the judgment in the Superior Court, the term to which the appeal should have been brought. *S. v. Farmer,* 188 N. C., 243, 124 S. E., 562; *Pentuff v. Park,* 195 N. C., 609, 143 S. E., 139.

The appeal, therefore, must be dismissed for failure to comply with the rules. *S. v. Surety Co.,* 192 N. C., 52, 133 S. E., 172; *Stone v. Ledbetter,* 191 N. C., 777, 133 S. E., 162.

It is true that appeals in civil cases from the First, Second, Third and Fourth districts which are tried between the first day of January and the first Monday in February, or between the first day of August and the fourth Monday in August, are not required to be docketed at the immediately succeeding term of this Court, though the rule is otherwise in criminal prosecutions, and even in civil cases if docketed in time for hearing at said first term, the appeal will stand regularly for argument. *Pentuff v. Park, supra.*

Appeal dismissed.

CARLENE WOODY v. A. A. PRIVETT.

(Filed 10 September, 1930.)

Judgments K b—Finding of meritorious defense is necessary to order setting aside judgment for excusable neglect, etc.

In order to have a judgment by default set aside on the ground of excusable neglect and irregularity the movant must show a meritorious defense, and where such defense is not made to appear an order granting a motion therefor will be vacated on appeal and the cause remanded.

APPEAL by plaintiff from *Grady, J.,* at May Term, 1930, of WILSON. Motion to set aside judgment by default and inquiry for excusable neglect and irregularity. Motion allowed, and plaintiff appeals.

W. A. Lucas for plaintiff.

O. P. Dickinson and Finch, Rand & Finch for defendant.

STACY, C. J. There is no finding of a meritorious defense, hence the order vacating the judgment will be set aside and the cause remanded for further proceedings not inconsistent with the rights of the parties. *Jones v. Swepson,* 94 N. C., 699; *Gaylord v. Berry,* 169 N. C., 733, 86 S. E., 623.

A party who seeks to be relieved from a judgment on the ground of excusable neglect or irregularity must show merit, otherwise the court would be engaged in the vain procedure of setting aside a judgment, when, if there be no defense, it would be its duty to enter the same judgment again on motion of the adverse party. *Taylor v. Gentry,* 192 N. C., 503, 135 S. E., 327; *Duffer v. Brunson,* 188 N. C., 789, 125 S. E., 619; *Crumpler v. Hines,* 174 N. C., 283, 93 S. E., 780.

Error and remanded.

JOE EAKER v. THE INTERNATIONAL SHOE COMPANY AND ROBEY SMALL.

(Filed 10 September, 1930.)

1. **Master and Servant C b—Evidence of employer's negligent failure to provide reasonably safe place to work held sufficient.**

Where in an action against an employer there is evidence tending to show that the plaintiff employee, after disengaging the clutch and stopping the drum in which hides were processed, was removing hides from the drum in the course of his duties, and that while so employed the clutch suddenly became engaged and the drum started revolving without any act on his part or those working with him, resulting in the injury in suit, and further that the clutch had not been inspected in two years, and that it became engaged because of defective oiling or because of clogged grease channels: *Held,* the doctrine of *res ipsa loquitur* applies, and the evidence is sufficient to be submitted to the jury and overrule defendant's motion as of nonsuit.

2. **Negligence A e—Doctrine of res ipsa loquitur warrants submission of case to the jury, the burden of proof remaining on plaintiff.**

Where the doctrine of *res ipsa loquitur* applies in an action to recover for a negligent injury it is sufficient to take the issue of negligence to the jury and sustain an affirmative answer, but the burden of proof on the issue remains on the plaintiff.

3. **Trial B e—The trial court has the power to withdraw incompetent evidence from the jury and instruct it not to consider it.**

The trial court has the power to withdraw incompetent evidence from the jury and instruct it not to consider it, and where an incompetent question is asked a witness over objection, and the witness' answer is promptly stricken from the record by the court and the jury instructed not to consider it, an exception thereto will not be sustained on appeal. *In re Will of Yelverton,* 198 N. C., 746, cited and distinguished.

4. **Evidence K b—Expert may testify as to results of injury disclosed by X-ray picture properly in evidence.**

   Where a physician has qualified as an expert witness, his testimony as to the results of an injury, based upon the disclosure of an X-ray picture properly taken by a competent person and admitted in evidence, is competent and not objectionable upon the ground that his opinion was based upon assumed facts arising from matters neither proven nor admitted.

5. **Same—Testimony of expert as to verity of X-ray picture held competent.**

   Where a witness has qualified as an expert with experience in reading and interpreting X-ray pictures, and has testified as to the extent of an injury based upon an X-ray picture properly introduced in evidence, his answer to a question as to the reliability of an X-ray picture that there was no way an X-ray picture could "fool" a physician merely amounts to a statement that an X-ray picture, properly taken, accurately produces a picture of human bones, and an exception to the answer will not be sustained on appeal.

6. **Trial E g—Instruction correct when taken as a whole will not be held for reversible error.**

   A charge of the court to the jury which is correct as to the duty of an employer to furnish an employee a reasonably safe place to work in the exercise of ordinary care, will not be held for reversible error, if the error, if any, is in the appellant's favor, or for the omission of the word "approved" in regard to appliances "approved and in general use," when from the entire charge and the circumstances of the case it appears that the appellant has not been prejudiced thereby, the case having been fully and correctly determined upon the principle of *res ipsa loquitur.*

7. **Master and Servant C b—Where injury would not have occurred if machinery had been in proper condition doctrine of res ipsa loquitur applies.**

   An employer is required in the exercise of ordinary care to furnish his employee a reasonably safe place to work and tools and appliances reasonably safe and suitable for the work and such as are approved and in general use, and to keep such tools and appliances in such condition in the exercise of due diligence, and where a disengaged clutch becomes engaged without the intervention of human agency, which would not happen if the machinery had been in proper condition, the doctrine of *res ipsa loquitur* applies.

APPEAL by defendant from *Harding, J.*, and a jury, at September Term, 1929, of BURKE. No error.

This is an action for actionable negligence brought by plaintiff against the defendants.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the plaintiff injured by the negligence of the defendant, the International Shoe Company, as alleged? Answer: Yes.

2. Was the plaintiff injured by the negligence of the defendant, Robey Small, as alleged? Answer: Yes.

3. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: No.

4. What damage, if any, is the plaintiff entitled to recover? Answer: $18,000."

The necessary facts will be stated in the opinion.

B. T. Falls, S. J. Ervin and S. J. Ervin, Jr., for plaintiff.
A. Hall Johnston and Self, Bagby & Patrick for defendants.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence, the defendants made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled the motions, and in this we see no error.

The plaintiff when injured was an employee and working in the bleach-room of the tannery plant of the defendant, International Shoe Company. It was admitted that the defendant, Robey Small, was foreman and superintendent of said department and the immediate superior of plaintiff, and it was the duty of plaintiff to perform his work under the direction and in accordance with the proper orders of said foreman and superintendent. The evidence on the part of plaintiff tended to show that plaintiff when injured was taking out hides, crops or bellies as they were termed, from the drum or wheel. The machinery that turns the drum or wheel gets its source of power from the motor, which is transmitted by a belt from the motor to the power shaft; from the counter shaft it is again transmitted by a belt to the clutch, and when you engage the clutch, that starts the drum or wheel off, but when the clutch is disengaged the drum or wheel is idle. The power that turns this drum or wheel is brought to it by means of a shaft 2 7/16 inches; this shaft is fitted in a sleeve that is around the shaft and is fastened to the pulley with which the belt runs from the counter shaft and also on this sleeve is fastened one-half of the clutch that is driven by the pulley. When the clutch is disengaged half of the clutch is rotating; the shaft is not rotating, but the sleeve is rotating on the shaft, being pulled by the belt; the drum or wheel is idle and the shaft is idle, but half of the clutch which fastened around the sleeve is rotating. When the other half of the clutch which is fastened on the 2 7/16 inch shaft is engaged with the half which is running on this sleeve, it causes these two, the half that is fastened to the shaft, when that becomes engaged with the other half, causes the 2 7/16 inch shaft to rotate, which in turn having a pin on the end of it, causes the drum or wheel to turn. The sleeve is running around the shaft all the time, while the motor is running, and the drum or wheel is standing idle. The function of the drums or wheels in the bleach-room were to oil the hides or leather; they are round like a drum, with flat ends; they are about ten feet in diameter and about six feet wide. They are used to put oil, salt, sugar and other ingredients in to treat the hides. After the hides are put in the clutch is shoved in and starts the wheel or drum revolving. The wheel or drum runs for about twenty minutes and then the hides are taken out. About 75 hides are placed in one of these wheels or drums at a time for treatment. When taken out they are handed to a helper and hung up. There is a door on the side of the wheel or drum, about 36 inches high and 42 inches wide, to put the hides in and take them out, and this is shut when the wheel or drum is revolving. The wheels or drums make about 21 revolutions a minute.

The plaintiff was unloading the hides from the wheel or drum about four o'clock in the evening, on 26 May, 1928, when he was injured. At the time this wheel or drum was stopped and the clutch pulled out, a stick was placed on the floor under the wheel or drum to hold it stationary. Plaintiff had taken all the hides out of the wheel or drum except about fifteen. To get these out it was necessary to put his body from his hips up inside the wheel or drum to reach them, and the wheel or drum started to revolve and the door hit him and he was thrown in the wheel or drum, and while it was revolving was thrown out, and rendered unconscious and permanently injured.

The evidence was to the effect that the clutch became engaged without any act on his part, or those working with him. That there was some defect that started the drum revolving. That the clutch became engaged and started up the machinery, by reason of the fact that the sleeve within which the shaft operating the machinery worked, became hot, and tight, and by reason of not being properly oiled, and that this was due to the closing up of the grease channels, which conveyed the oil or grease to the shaft within the sleeve, causing the sleeve to turn with the shaft, and engage the clutch. There was evidence that this sleeve within which the shaft turned, became so tight that it had to be cut in order to remove it from the shaft, and there was also evidence that this sleeve had not been removed and inspected for a period of two years, and that the inside of the sleeve and the shaft was gummed up with dried oil or other material, and that the oil in the cup could not properly reach the inside of the sleeve, as the channels which should have conveyed it, were to some extent closed up. On the other hand, the defendants offered evidence tending to show that the reason for the accident, was that some hard substance had gotten into the oil cup, and from thence through the grease channels into the sleeve, and this without fault on its part, and that this caused friction which rendered the sleeve tight, causing it to turn with the shaft, and that this caused the clutch to become engaged, and start the machinery, the wheel or drum to revolve, and the plaintiff to be injured.

Among the duties of defendant Small was to oil the machinery by means of the oil or grease cup. When the clutch is disengaged there is a space of about an inch between the two portions thereof, and when these two portions of the clutch are brought together, or engaged, the communicated power turns the shaft and the wheel or drum.

Defendants contended that plaintiff set forth in the complaint that the clutch was defective, which, if established as a fact, would warrant the contention that there was failure to make proper inspection, or failure to make repairs after knowledge or implied notice of such defective condition; whereas, if the actual cause of the "running away" of the wheel or drum was not a defective clutch, but the presence of some hard foreign substance in the grease for which defendants were not accountable, such contention on the part of plaintiff was ill-founded. Further that there was no evidence that the clutch was defective.

Plaintiff specifically alleges in his complaint that the injuries of the plaintiff herein complained of were directly and proximately caused by and due to the negligence and carelessness of the defendants in failing to inspect said oil wheel or drum and clutch and the machinery and appliances connected therewith and *in failure to keep said oil wheel or drum and clutch and machinery and appliances in reasonably safe condition and repair* and in ordering the plaintiff, who was ignorant of such defects, to unload said oil wheel or drum when the defendants well knew that such defects existed and that said oil wheel or drum in all probability would suddenly begin to revolve about said penetrating shaft and "run away" and injure the plaintiff, and in failing to furnish and provide for the plaintiff a reasonably safe place in which to work and reasonably safe tools and machinery and appliances with which to work.

We think that, from the admitted facts, the principle of *res ipsa loquitur* applies.

The case of *Ross v. Cotton Mills,* 140 N. C., 115 is similar to the case at bar. In the *Ross case* the plaintiff had stopped the machine. He testified that when it was stationary, "I put my hand over feed roll into heater bars to get cotton out. Machine started by some means and tore off my arm to my elbow, knocked me numb or paralyzed." The Court in that case, at p. 119, said: "To prevent any misconstruction of the circumstances under which or the manner in which this principle applies in the trial of such cause we wish to restate what was said in *Womble v. Grocery Co.,* 135 N. C., 474: 'The principle of *res ipsa loquitur* in such cases carries the question of negligence to the jury, not relieving the plaintiff of the burden of proof, and not raising any presumption in his favor, but simply entitling the jury, in view of all the circumstances and conditions as shown by the plaintiff's evidence, to infer negligence and say whether upon all of the evidence the plaintiff has sustained his allegation.' It does not in any degree affect or modify the elementary principle that the burden of the *issue* is on the plaintiff. *Walker, J.,* in *Stewart v. Carpet Co.,* 138 N. C., 60, clearly states the law in this respect: 'The doctrine does not dispense with the requirement that the party who alleges negligence must prove the fact, but relates only to the mode of proving it. The fact of the accident furnishes merely some evidence to go to the jury which requires the defendant 'to go forward with his proof.' The rule of *res ipsa loquitur* does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor.'" *Stewart v. Carpet Co., supra; Cook v. Mfg. Co.,* 183 N. C., 55; *McAllister v. Pryor,* 187 N. C., 837; *Murphy v. Power Co.,* 196 N. C., 484; *Bryant v. Construction Co.,* 197 N. C., 639.

In the *Bryant case, supra,* at p. 643, we find: "In some of our decisions and expressions *res ipsa loquitur,* prima facie evidence, prima facie case, and presumption of negligence have been used as practically synonymous. As thus used, each expression signifies nothing more than evidence to be considered by the jury." See *Springs v. Doll,* 197 N. C., 240; *Bowden v. Kress,* 198 N. C., 559.

We do not think the learned counsel for defendants seriously disputed the above settled law, from the prayers for instructions which they made and which were given by the court below. Among them were the following: "Although the facts and circumstances which plaintiff contends that he has established are, in the absence of explanation, sufficient and proper to be considered by you as some evidence of negligence on the part of the defendants, yet, even in the absence of any explanation of such facts and circumstances, it would not necessarily be your duty to find that the defendants were guilty of negligence; but defendants have offered evidence tending to explain the facts and circumstances relied on by the plaintiff, and tending to show that the plaintiff's injuries were not proximately caused by any negligence of defendants; and the court instructs you, in this connection, that the law does not cast upon defendants the burden of disproving negligence by a preponderance of evidence, but the burden of proof on that issue still rests upon and remains with the plaintiff, and unless he has satisfied you from all the evidence, and by its greater weight, that the injuries of which he complains were proximately caused by the negligence of the defendants, as alleged in the complaint, it will be your duty to answer the first and second issues No."

The defendants state that several questions are involved:

(1) Does the withdrawal of incompetent or prejudicial testimony received in answer to an incompetent question duly objected to, and an instruction to the jury not to consider it, cure the wrong to the objecting party?"

The accident happened on Saturday.

The question objected to and motion to strike out answer is as follows: "Q. Do you know whether anything had been done to the wheel between Saturday and Monday, of your own knowledge? A. On Monday, it ran away at 12 o'clock." The record discloses that the question was withdrawn and answer ordered stricken from the record, and the jury instructed not to consider it.

It has long been the settled law in this judisdiction that the court below has the power to withdraw incompetent evidence and instruct the jury not to consider it. *Cooper v. R. R.,* 163 N. C., 150; *S. v. Stewart,* 189 N. C., at p. 345; *S. v. Love,* 189 N. C., at p. 773; *S. v. Griffin,* 190 N. C., at p. 135.

The evidence was promptly stricken from the record, and the jury instructed not to consider it. The record in the present case discloses a very different state of facts from the *Yelverton case.* See *In re Will of Yelverton,* 198 N. C., at p. 749. This exception and assignment of error cannot be sustained.

(2) May counsel, in the examination of an expert witness offered by him, assume as facts, matters neither proved nor admitted?

The question and answer, in part, are as follows: "Q. What effect would the fracture of one of the vertebrae there have upon his capacity to lift? A. That bone is part of the vertebrae. It is just a general fracture. I said, in my opinion that there was a fracture of the fifth vertebrae besides the displacement to it. I think this injury would almost completely incapacitate him to work."

Dr. Kirksey testified, without objection: "This is the picture I had Miss Powell to make (examining). The picture showed a fracture of the tip of the transverse process of the third lumbar vertebrae on the left side, or in words the jury may understand, it shows a fracture of the little bone extending out from the bottom of the back bone. (Exhibiting and explaining picture to jury.) Here is the bone that extends out from the spinal column, extends out about an inch or an inch and a half, and the fracture is about a half inch from the end. Then there is the fifth, or last, vertebrae, that is a displacement of that vertebrae forward in a slight rotation towards the right." We think the exception and assignment of error were not well taken.

(3) Does the X-ray photograph or film import verity, or is its competency as well as its probative value dependent upon the manner of its making and interpretation?

The question and answer are as follows: "Q. Speaking of a patient fooling you, Doctor, do you know of any way by which an X-ray picture can fool a doctor? A. I do not, if you see it, there is no way to fool you."

The plaintiff had theretofore shown by the testimony of his witness, Miss Clarissa Powell, that the X-ray pictures of the spinal column were properly made on a standard machine at the instance of Dr. Kirksey, the plaintiff's witness, and at the instance of Dr. Phifer, the defendants' witness. Miss Powell had been engaged for nine years in making X-ray pictures for various hospitals and physicians, and in such work had used all kinds of X-ray machines. Dr. Kirksey had had experience in reading and interpreting X-ray pictures. The testimony was competent and merely amounted to the statement of the medical witness that an X-ray picture, properly taken, accurately produces a picture of human bones.

A witness who is an expert need not necessarily be a technical specialist. *Pridgen v. Gibson,* 194 N. C., 289.

In *Liles v. Pickett Mills,* 197 N. C., p. 772, we find the following: "The judge expressed his willingness to admit the photograph (X-ray) in evidence provided expert testimony was introduced satisfactorily explaining the photograph to the jury, but held upon the evidence offered that the witness had not qualified himself as sufficiently expert in questions of anatomy to testify in reference to the proposed explanation."

From the facts appearing in this case, we think the evidence competent. The X-ray pictures are not like the man that looks in a glass.

"For if any be a hearer of the word, and not a doer, he is like unto a man beholding his natural face in a glass:

For he beholdeth himself, and goeth his way, and straightway forgetteth what manner of man he was." James 1: 23, 24.

In *Welch v. Coach Line,* 198 N. C., p. 131, is the following: "It is the common practice to receive maps, diagrams, photographs, and pictures for the purpose of giving a representation of objects and places which generally cannot be conveniently described by witnesses. Especially is this true of X-ray pictures which usually require an explanation by parol." *Lupton v. Express Co.,* 169 N. C., 671.

We do not think this exception and assignment of error can be sustained.

(4) Should a verdict be allowed to stand, rendered upon a charge containing statements as to contentions with respect to facts and instructions as to matters of law—favorable to the prevailing party—not based on evidence?

The exception was to the following part of the charge: "Now, the court charges you, that if you shall find, by the greater weight of the evidence, that the defendants in this case failed to exercise that care which an ordinarily prudent person, surrounded and situated as the defendants were on that occasion, would have exercised, in furnishing plaintiff a reasonably safe place in which to do his work, or failed to exercise reasonable care—the same sort which an ordinarily prudent person surrounded and situated as the defendants were would have exercised—in furnishing a machine in general use by those engaged in that sort of business, or failed to exercise due care to keep it in a reasonably safe condition, and then if you should further find by the greater weight of the evidence that such failure was the proximate cause of the plaintiff's injury, then you should answer the first and second issues, Yes. The court had just prior charged: "The defendants are not insurers. The law does not require that the defendants should guarantee that the plaintiff would not get hurt; the law did not require the defendants to guarantee the plaintiff that that machine would not turn, nor to guarantee that the clutch would not become engaged. It was not an insurer that the thing would not happen."

We see nothing prejudicial in the use of the word "general" instead of "such as are approved and in general use," in the charge. *Lacey v. Hosiery Co.*, 184 N. C., 19.

As heretofore stated, we think the principle of *res ipsa loquitur* applies and from all the facts and circumstances in this case we see no error in the charge, especially when taken as a whole and in connection with defendants' prayers for instructions given by the court below, which cover the law applicable to the case as contended for by defendants. We must not forget that circumstantial as well as direct evidence applies to a civil as well as a criminal action. The charge can be based on both in the present case. This exception and assignment of error cannot be sustained.

Nor can we see any error, considering the charge as a whole. The plaintiff was entitled to more than was given, as the principle of *res ipsa loquitur* applied, as before explained, on the facts in this case.

It is well settled law that the employer is required to provide for his employees in the exercise of proper care a reasonably safe place to work and to supply them with machinery, implements and appliances reasonably safe and suitable for the work in which they are engaged, and such as are approved and in general use in plants and places of like character, and an employer is also required to keep such machinery in such condition as far as this can be done in the exercise of proper care and diligence. *Street v. Coal Co.*, 196 N. C., 178; *West v. Mining Co.*, 198 N. C., 150. When machinery suddenly starts up, as in this case, by reason of the clutch which turns on the power becoming engaged and this, without the intervention of human agency, and such result does not occur when the clutch and machinery is in proper condition, the rule *res ipsa loquitur* applies.

The numerous exceptions and assignments of error not here considered, made during the trial to the admission and exclusion of evidence, we have examined carefully and see no new or novel proposition of law presented. The evidence as to the extent of the injury was conflicting.

Defendants, on cross-examination of Dr. J. J. Kirksey, elicited the following: "Q. And you know, as a fact, has it not been your observation, that men, much more seriously handicapped than this plaintiff appears to be, have been able to work and earn a living by manual exertion, not depending upon their wits or brains? A. I don't know of anybody with a broken back that is working. I don't happen to know of a case with this type of injury. I will say, that he can walk while he cannot do manual labor. There is a great deal of difference in being able to walk and in doing manual labor. There might possibly, by some improvement in the future, but I don't see how there can be a complete recovery. He will never be as good as he was before the injury, although there might be a slight improvement."

There was other evidence bearing on the permanency of plaintiff's injury and his incapacity for work. Plaintiff earned $3.67 a day. He testified in part: "Before my injury, I was always stout and healthy and able to do anything that came my way. I hardly ever lost a day from work. . . . Since my injury, I have not earned anything, only what they gave me at the tannery. I have not been able to work to earn anything. My general health and strength before the injury was good, but I have not had any since. When I go to bed at night, my back hurts so that I cannot sleep, rest or anything else. The pain is mostly in the small of my back, in what the doctor calls the lumbar region. I cannot earn a living except through the mercy of the people. I have always earned a living by working before the injury. I have not been educated to do any kind of work except manual work."

The briefs of the learned counsel for the parties go into every phase of the controversy. We cannot see any reversible or prejudicial error on the record. The court below not only fully charged the law as favorable as defendants could expect, but gave all the prayers for instructions asked for by defendants and drawn by them to present the most favorable view for defendants.

The issues of fact were found by the jury in favor of plaintiff, and we can see no error in law.

No error.

HARRY E. COLE v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 10 September, 1930.)

1. **Master and Servant E a—Liability of railroad for injury to employee engaged in interstate commerce is governed by Federal decisions.**

In an action in our State court by an employee for damages against a railroad company for an injury inflicted on him while engaged in interstate commerce, the defendant's liability is governed by the Federal Employers' Liability Act and the principles of the common law as applied in the Federal courts.

2. **Master and Servant E b—In order to recover under the Federal Employers' Liability Act the plaintiff must establish negligence.**

In an action by an employee to recover damages from a railroad company under the provisions of the Federal Employers' Liability Act he must show such negligence on the part of the railroad company as would entitle him to go to the jury under the common law, and that such negligence was a proximate cause of the injury, the burden of proof being upon him as a matter of substance and not of procedure.

3. **Same—Employer is under duty to furnish reasonably safe place to work and tools and appliances reasonably safe and suitable therefor.**

While an employer is not an insurer of the safety of his employee, it is his duty to provide him, in the exercise of due care, a reasonably safe place to work and reasonably safe and suitable tools and appliances with which to do the work, and although the employer is not required to inspect simple tools which do not "import menace of injury," he is under duty, in the exercise of due care, to inspect such tools where the employee does not have the power of selection or the opportunity of inspection.

4. **Same—Evidence of railroad's negligent failure to provide reasonably safe place to work and reasonably safe tools therefor held sufficient.**

Where in an action by an employee against a railroad company to recover damages for a personal injury under the Federal Employers' Liability Act, there is evidence tending to show that the plaintiff employee was ordered by the defendant company's foreman to repair a locomotive without placing the locomotive over a pit as was usual and customary in such cases, and that the employee was furnished a defective wrench and blade-setter with which to do the work, and that the employee was ignorant of the defect in the blade-setter, and that because of the cramped position in which he was forced to work he could not see such defect, and that the wrench slipped causing the injury in suit: *Held,* the evidence was sufficient to take the case to the jury upon the question of the defendant's actionable negligence.

5. **Same—Where negligence of defendant is dominant and efficient cause of injury he is liable in damages therefor.**

Although in order for an employee to recover against a railroad company under the Federal Employers' Liability Act, it is necessary that the plaintiff employee establish the defendant's negligence as the proximate cause of the injury, whether the act of the employee in placing a piece of iron pipe over the end of a defective wrench, furnished by the defendant, in order to obtain greater leverage, was an intervening cause is held a question for the jury under the facts of this case where the employee used slight force against the wrench and was forced to work in a cramped position on account of the defendant's failure to provide a pit ordinarily used for such repairs.

6. **Same—An employee does not ordinarily assume the risk of the employer's negligent act.**

An employee assumes the ordinary risks of his employment, but not such risks as are due to the negligence of the employer until the employee is aware of the negligent act and the risk arising therefrom, unless the negligence and the risk are so obvious that a person of ordinary prudence in his position would have observed and appreciated them.

STACY, C. J., dissents.

APPEAL by defendant from *Daniels, J.*, at January Term, 1930, of WAKE. No error.

This is an action to recover damages for personal injury under the Federal Employers' Liability Act. It is admitted that at the time of the injury the defendant was engaged in and the plaintiff was employed by the defendant in interstate commerce. The plaintiff is a machinist. On 15 October, 1926, he was ordered by the defendant's foreman to repair a locomotive engine which was on the defendant's repair track in Durham. The right link saddle pin had been broken and the right tumbling shaft had been bent and twisted underneath the engine. The plaintiff was to make the repairs by going under the engine, taking down the broken parts, and straightening the tumbling shaft. He alleged and testified that he requested the defendant to put the engine over a pit provided for use when such repairs were to be made, so that the defective parts of the engine would be more accessible and the shaft arm could be properly heated; that the pit is "always the place" for such repairs; that his request was refused; that it was necessary to turn the threaded screw in a blade-setter by an eye-wrench intended to fit the hexagon head of the screw; that the defendant negligently furnished and required the plaintiff's helper to use an eye-wrench which was defective and a blade-setter, the screw in which was so worn that the wrench would suddenly lose hold on the head of the screw; and that while engaged in the performance of his duties in making the repairs (the wrench suddenly losing its hold on the screw of the blade-setter), the plaintiff was violently thrown against a part of the engine by which he was caused to suffer serious personal injury. The plaintiff's specific charges of negligence are stated in the opinion.

The defendant filed an answer and issues involving the defendant's negligence, the plaintiff's contributory negligence and assumption of risk, and damages were submitted to the jury, and all were answered by the jury in favor of the plaintiff. Judgment was given for the plaintiff and the defendant excepted and appealed. There is no exception to the instructions given the jury.

Clyde A. Douglass, Robt. N. Simms, O. F. Johnson and D. F. Hallihan for plaintiff.
Murray Allen for defendant.

Adams, J. When the injury occurred the defendant was engaged, and the plaintiff was employed by the defendant, in interstate commerce. This is admitted. The case must therefore be determined by the Federal Employers' Liability Act and the principles of the common law as applied in the courts of the United States. *Toledo, St. Louis & Western Railroad Co. v. Allen,* 276 U. S., 165, 72 Law Ed., 513. Before this act was passed the liability of employers engaged in interstate commerce for injuries suffered by their employees while engaged in such commerce was governed by the laws of the several states, because Congress, although empowered to regulate the subject, had not acted in reference to it; but the act took possession of the field of liability in such cases and superseded all State laws upon this subject. *Mondou v. N. Y., N. H. & H. R. Co.,* 223 U. S., 1, 56 Law Ed., 327; *Chicago, etc., R. Co. v. Wright,* 239 U. S., 548, 60 Law Ed., 431; *New York C. R. Co. v. Winfield,* 244 U. S., 147, 61 Law Ed., 1045; *Chicago, M. & St. P. R. Co. v. Coogan,* 271 U. S., 472, 70 Law Ed., 1041.

A material part of the act applicable to the first issue provides that "every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars . . . appliances . . . or other equipment." 45 U. S. C. A., sec. 51.

Under this section negligence is the basis of recovery and is an affirmative fact which the plaintiff must establish, the burden of proof being a matter of substance and not of procedure. *New Orleans, etc., R. Co. v. Harris,* 247 U. S., 367, 62 Law Ed., 1167; *Missouri Pac. R. Co. v. Aeby,* 275 U. S., 426, 72 Law Ed., 351; *Chesapeake & Ohio R. Co. v. Stapleton,* 279 U. S., 587, 73 Law Ed., 861. The act creates no rights that did not exist at common law, and the plaintiff must show such negligence as under the common law should be submitted to the jury. *Woods v. Chicago, B. & Q. R. Co.,* 137 N. E., 806; *Saunders v. R. R.,* 167 N. C., 375.

In substance the plaintiff's allegations are that the defendant negligently failed (1) to provide for the plaintiff a reasonably safe place in which to work, (2) to furnish the plaintiff or his helper a reasonably safe eye-wrench and blade-setter, (3) and to inspect these implements; and, further, (4) that the defendant gave the plaintiff a positive command to hasten his work, and (5) that the helper negligently used the tools, permitting the wrench to lose its hold on the screw.

The parties agree that the judge reviewed and explained the evidence and correctly charged the law. The two propositions on which the appellant chiefly relies are these: (1) There is no sufficient evidence of actionable negligence; (2) the plaintiff assumed the risk of injury. A new trial is not requested, because the plaintiff was permitted to express an opinion that if the tools had not been worn the wrench could not have slipped as a result of the force applied, but the rejection of the testimony is urged on the ground of its asserted incompetency. It is argued that the evidence requires a negative answer to the issue of negligence and an affirmative answer, as a matter of law, to the issue involving the assumption of risk.

The fourth and fifth allegations of negligence may be disregarded for the reason that the evidence does not establish a causal relation between either of them and the injury sustained; but we do not concede, as the appellant insists, that this conclusion applies with equal force to the first alleged ground of negligence.

The appellant contends that it was not negligent, in any respect, but if it was, that its negligence was not the proximate cause of the injury.

In furnishing tools for an employee, or a place for his work, an employer is bound to the exercise of due care—the care which the exigencies of the work reasonably demand. He is not required to insure the safety of the appliances or to furnish the latest and best; but he is under a duty to exercise reasonable care and prudence for the safety of the employee in providing him with tools that are reasonably safe and suitable for the work to be done. *Hough v. Texas & P. R. Co.,* 100 U. S., 213, 25 Law Ed., 612; *Gardner v. Michigan Central R. Co.,* 150 U. S., 349, 37 Law Ed., 1107; *Union Pac. R. Co. v. O'Brien,* 161 U. S., 451, 40 Law Ed., 766; *Seaboard Air Line R. Co. v. Horton,* 233 U. S., 492, 58 Law Ed., 1062. While a purchaser of implements and machinery is ordinarily justified in assuming that proper care was taken in the manufacture he is not for that reason relieved in all cases of the duty of inspection. *Northern Pacific R. Co. v. Herbert,* 116 U. S., 642, 29 Law Ed., 755; *Richmond & Danville R. Co. v. Elliott,* 149 U. S., 265, 37 Law Ed., 728. The principle is stated in *Thompson v. Oil Co.,* 177 N. C., 279, as follows: "It is the accepted principle in this State that an employer of labor, in the exercise of reasonable care, is required to furnish his employees a safe place to work and provide them with implements, tools, and appliances suitable for the work in which they are engaged. *Kiger v. Scales Co.,* 162 N. C., 133; *Mincey v. Coast Line,* 161 N. C., 467; *Reid v. Rees & Co.,* 155 N. C., 231; *Hicks v. Mfg. Co.,* 138 N. C., 319. And it has been repeatedly held that the position may be recognized in the case of simple, ordinary tools, where the defect 'is of a kind importing menace of substantial injury, having due regard to the nature of the work and the manner of doing it, and it is further shown that the employer knew of such defect or should have found it out under the duty of inspection ordinarily incumbent upon him in tools of that kind,' etc. *King v. Atlantic Coast Line,* 174 N. C., 39; *Rogerson v. Hontz, etc.,* 174 N. C., 27; *Wright v. Thompson,* 171 N. C., 88; *Reid v. Rees, supra; Mercer v. R. R.,* 154 N. C., 399."

As a rule an employer is not required to inspect simple tools which do not "import menace of injury," because the employee, having occasion to use them, is in a position to discover their defects. Relaxation of the duty to inspect simple tools presupposes that the employee by using them has had a better opportunity to observe their defects and that his knowledge is equal or superior to that of the employer. *Mercer v. R. R., supra; Wright v. Thompson, supra; Clinard v. Electric Co.,* 192 N. C., 736. But if the employee has no power of selection or opportunity for inspection the rule is not relaxed and the employer is held to the usual requirements to exercise ordinary care to furnish tools that are reasonably safe. In such case there is no equality of knowledge. *Stork v. Cooperage Co.,* 127 Wis., 322; *Rollings v. Levering,* 18 N. Y., 224; *Guthrie v. R. R.,* 11 Lea, 372; *Chicago v. Blivins,* 46 Kan., 370; *Newboer v. R. R.,* 60 Minn., 130; *R. R. v. Amos,* 20 Ind., 378. When a tool becomes defective and the employer has actual or constructive notice of the defect and the employee is ignorant of it the employer as a rule is liable for exposing the employee to a peril of which he had no knowledge. *Fort Smith & W. R. Co. v. Holcombe,* 158 Pac., 633; *Swain v. Chicago, R. I. & P. R. Co.,* 170 N. W., 296, affirmed on rehearing, 174 N. W., 384.

The Federal Act embraces simple as well as complex tools. *Gekas v. Navigation Co.,* 146 Pac., 970.

In reference to his knowledge of the wrench and blade-setter the plaintiff testified as follows: "He (Mordecai, the foreman) and the helper furnished the tools. . . . I did not have anything to do with the selection of the tools. Mr. Mordecai sent the helper to get the blade-setter, and Mordecai handed me the wrench; and the blade-setter and the wrench were handed me while I was under the engine. . . . Right after I was hurt I examined the blade-setter and wrench. The condition of the blade-setter was that it had been used so much until the head was smaller than the original size. The blade-setter head was six-sided. The only thing wrong with that was it was too small for the wrench that I was using. The wrench was almost a complete circle and worn. It was intended to be six-sided. . . . I did not have any knowledge of the fact that the foreman had furnished me with a wrench that would slip on the blade-setter. I did not know that he had furnished me that kind of a wrench. . . . I knew I would have to have a wrench and blade-setter. . . . I could not tell you how many times I had used that wrench before. It worked well on new nuts. It was part of the machinist tools. We hardly ever used it. It was part of my equipment, open to my use and inspection. I could look at it every time I had an opportunity to use it. I cannot exactly say that I did know the condition of the wrench. I had never paid attention to it. It worked all right on a full nut, but on an old head or bolt it would not. I knew it would work on a new nut. I have seen wrench and blade-setter before, but had not used them together. Had only used wrench on a full-sized nut; it would be used on other hexagon nuts on engine. . . . The blade-setter was part of the tools. I never used it before. . . . It was there as a part of the machinist tools. . . . I was the only machinist there. All machinist tools were there for the use of all of us, not mine any more than anybody else's. . . . When the wrench and blade-setter were handed to me I put the blade-setter on the tumbling shaft arm. I was in a cramped position. I was kinder like this (illustrates), and fastened it on. The boiler is not high enough and I had to stoop. When I stooped about like I said the blade-setter was lower than my eyes. I could not say how much lower. It was about one foot away. With my eyes in about one foot of the blade-setter I placed the wrench on it. At that time the blade-setter and the wrench were within one foot of my eyes. The head of the screw was inside and not in view. The head of the blade-setter was out here like that (illustrates with photograph held on one side). I was within one foot of the blade-setter and I took the wrench and put it over the head of the blade-setter."

The plaintiff knew the condition of the wrench; but the wrench worked satisfactorily on a "full or new nut." The blade-setter was defective; the head of the screw was worn; it was too small for the wrench. The plaintiff had no knowledge of the defect; he had never used the blade-setter or had any occasion to inspect it. He had a right to assume that it was in good condition. When he set it close to the right tumbling shaft arm, "within one foot of his eyes," the head of the screw was not in view. His inability to see it was due to his "cramped position"; he could have seen it if the car had been over the pit. (In this testimony is involved the alleged negligent failure to provide a safe place for the plaintiff's work.) He had never made similar repairs under such conditions. The foreman was there, partly supervising the work. The plaintiff said, "At the time I was hurt I was doing the work like Mr. Mordecai had ordered me to do it."

Whether the blade-setter is a simple tool in the sense in which the term is applied to hammers, chisels, spades, and axes, may be doubted; but if it is, we cannot hold as a conclusion of law that there is no evidence of the defendant's negligence. There was no error in submitting the issue to the jury.

Was the plaintiff's injury the proximate result of the defendant's negligence, or of a supervening, independent instrumentality improvised by the plaintiff? It is a contention of the defendant that the alleged negligence cannot consistently be regarded as the proximate cause of the injury. On this point the plaintiff's testimony is pertinent: "I took the wrench and put it over the head of the blade-setter. I put a piece of one and a quarter-inch pipe on the end of the wrench handle. I did not do that before I pulled. I pulled on the wrench and had the piece of pipe, and then I put a steel rod on the end of the pipe, which made about four feet leverage from the eye of the wrench out to the end, and this is when it gave way. I pulled first with the wrench. Then I put a piece of pipe on it and pulled. Finally, I put on another piece in the pipe and pulled on that; that made the whole instrument about four feet long. I had my hand on the wrench to keep the pipe from slipping further on the wrench handle. My other hand was resting on something, I suppose. That was when the wrench slipped. My hand was on the wrench to keep the pipe from slipping and it was not more than a guide, because I was in such a cramped position that there was not power or force. I was not pulling on the wrench. I fell against the line and it hit me in the navel. I was shoving the wrench up what I could. I should say I was possibly 12 or 18 inches from that link that I fell against."

On his direct examination the plaintiff had said this: "I had the blade-setter as close as could get it on the right tumbling shaft arm. That was the proper position for the blade-setter. After putting the wrench on, I put a piece of pipe about 21 inches long and a little steel jimmy bar on the end of the pipe, and the helper was pulling at the end of the jimmy bar and I was assisting him as much as I could to keep the pipe from slipping further and the wrench slipped and pitched me forward, and I hit the link with my navel. I was in a cramped position and the wrench in my hand, and I hit the link in a cater-cornered direction."

It is argued that the plaintiff's injury was the result of his own conduct in using the tools in a manner not contemplated by the defendant; but increasing the leverage of the wrench was an act nearly related to its common use and not essentially beyond the reasonable contemplation of the parties. The appellee insists, as a matter of common knowledge, that workmen habitually lengthen the handles of tools in order to gain greater leverage. The plaintiff testified that owing to his cramped position his pull of the wrench, both before and after the handle was lengthened, was without "power or force." When the helper pulled, the plaintiff merely held the pipe to keep it from slipping on the wrench.

There must be a proximate causal relation between the negligent act and the injury suffered. If an instrumentality entirely independent of and unrelated to the defendant's negligence caused the injury the defendant is not liable. The proximate cause is the dominant, efficient cause, without which the injury would not have occurred. It is insisted that if the handle of the wrench had not been extended the injury would not have resulted, and that this is a necessary deduction from the plaintiff's testimony. It is not a necessary deduction, particularly when viewed in the light of the plaintiff's position and the slight force he applied. Whether it was a reasonable deduction was a matter for the jury, and, under the agreement appearing of record, the question is presumed to have been considered by the jury and determined against the defendant's contention.

The controlling principle is stated in *Atkinson T. & S. R. Co. v. Calhoun,* 213 U. S., 1, 53 Law Ed., 671, as follows: "The law, in its practical administration, in cases of this kind regards only proximate or immediate, and not remote, causes, and, in ascertaining which is proximate and which remote, refuses to indulge in metaphysical niceties. Where, in the sequence of events between the original default and the final mischief an entirely independent and unrelated cause intervenes, and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause. *Louisiana Mut. Ins. Co. v. Tweed,* 7 Wall, 44, 52, 19 Law Ed., 65, 67. This is emphatically true when the intervening cause is the act of some person entirely unrelated to the original actor. Nevertheless, a careless person is liable for all the natural and probable consequences of his misconduct. If the misconduct is of a character which, according to the usual experience of mankind, is calculated to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse him, and the subsequent mischief will be held to be the result of the original misconduct."

The defendant cannot be relieved of responsibility on the ground referred to unless the evidence discloses the intervention of a new cause, independent of, and unrelated to the defendant's wrongful act. *Texas & Pac. R. Co. v. Stewart,* 228 U. S., 357, 57 Law Ed., 875; *Scheffer v. Washington City, etc., R. Co.,* 105 U. S., 249, 26 Law Ed., 1070. "The inquiry must always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury." *Milwaukee, etc., R. Co. v. Kellott,* 94 U. S., 469, 24 Law Ed., 256. An apt illustration of an independent and unrelated cause appears in *Atchison, T. & S. F. R. Co. v. Calhoun, supra.*

We conclude, in the light of the authorities, that the use of the wrench was not disconnected from the primary fault of the defendant and was not an independent cause of the plaintiff's injury.

The last exception relates to the assumption of risk. U. S. C. A., sec. 54. This defense, as applicable to the present case, remains as at common law. *Jacobs v. So. Ry. Co.,* 241 U. S., 229, 60 Law Ed., 970. The plaintiff assumed the ordinary risks of his employment, but not such as were due to the negligence of the defendant until he became aware of the negligent act and the risk arising out of it, unless the negligence and the risk were alike so obvious that a person of ordinary prudence in his situation would have observed and appreciated them. *R. R. v. Horton, supra; Erie R. Co. v. Purucker,* 244 U. S., 320, 61 Law Ed., 1166. We cannot hold as an inference of law that, in the circumstances disclosed by the evidence, the plaintiff had knowledge of any defect in the blade-setter or that the danger and risk of injury were so obvious that he should have appreciated them. We find

No error.

STACY, C. J., dissents.

WALTER PYATT v. SOUTHERN RAILWAY COMPANY.

(Filed 10 September, 1930.)

1. **Master and Servant E a—Liability of railroad for injury to employee engaged in interstate commerce is governed by Federal decisions.**

   In an action in our State court by an employee for damages against a railroad company for an injury inflicted on him while engaged in interstate commerce, the defendant's liability is governed by the Federal Employers' Liability Act and the principles of the common law as applied by the Federal courts.

2. **Master and Servant E b—In order to recover under Federal Employers' Liability Act the plaintiff must establish negligence.**

   Under the provisions of the Federal Employers' Liability Act the plaintiff employee must establish the negligence of the defendant railroad company, and no recovery can be had merely by proof of injury sustained by the employee while engaged in interstate commerce.

3. Same—Contributory negligence will not bar a recovery under the act where the defendant violates any statute enacted for employees' safety.

Under the provisions of the Federal Employers' Liability Act contributory negligence of an employee will not be considered when the injury is a result of the violation by the defendant of any statute enacted for the safety of such employee.

4. Same—An employee does not ordinarily assume the risk of the employer's negligent act or order.

An employee assumes the ordinary risks of his employment, but not such risks as are due to the negligence of the employer until the employee is aware of the negligent act and the risk arising therefrom, unless the negligence and the risk are so obvious that a person of ordinary prudence would have observed and appreciated them and quit the employment rather than incur them.

5. Same—Evidence of employer's negligence held sufficient to go to the jury in this case.

Where, in an action by an employee against a railroad company to recover damages for a personal injury under the Federal Employers' Liability Act, there is evidence tending to show that the plaintiff employee was ordered by the carrier's *alter ego*, in helping to remove a worn rail from the track, to strike and loosen the rail at one end, and that the plaintiff, after striking several blows with a hammer furnished by the defendant, stepped over between the rails to see if all spikes had been removed, and that at this moment the foreman and another worker loosened the rail with crow-bars, causing it to hit and injure the plaintiff, and that the plaintiff was not warned, as was the custom, that the rail was going to be moved by crow-bars, is *held*, under the provisions of the Federal Employers' Liability Act, sufficient to be submitted to the jury on the question of negligence, contributory negligence and assumption of risks.

6. Appeal and Error E a—An exception without an assignment of error thereon will not be considered on appeal.

An exception without error assigned thereon will not be considered on appeal to the Supreme Court. Rule 28, 192 N. C., 853. *Semble*, the testimony objected to was properly admitted as a "shorthand statement of a collective fact."

7. Trial E g—Charge correct when construed as a whole will not be held for reversible error.

A charge of the trial court to the jury will not be held for reversible error when construing the charge as a whole it correctly gives the law applicable to the evidence in the case.

APPEAL by defendant from *Harding, J.*, and a jury, at February Term, 1930, of MCDOWELL. No error.

This is an action for actionable negligence brought by plaintiff against defendant. The defendant denied negligence and also set up the plea of assumption of risk and contributory negligence. The evidence of plaintiff was to the effect: That he worked on the Asheville division of the defendant company, near the 97th mile post, east of Marion junction. When he was injured on 28 May, 1928, he was a laborer, and with three others was working under J. E. Sigmon, who was section foreman or boss, and whose orders he was in duty bound to obey. The place was on a curve and the track the trains came on could be seen about 150 to 200 yards each way from the place they were working. About twenty trains passed over the track each day. A rail on the north side of the curve, the outside rail on the track, had become defective or worn and had to be removed and a sound rail put in its place. The new rail, weighing about 900 pounds, was brought by the crew and put in the center of the track south of and two feet from the worn rail to be removed, and about seven inches had to be cut off to fit and allow for expansion and contraction. This took about 30 or 40 minutes. After this was done, two of the laborers were sent in opposite directions with red flags to protect the workmen from the coming of trains. To remove the worn or defective rail, the laborers with the crowbars pulled out the spikes on the inside of the rail; one of the laborers worked on the east and plaintiff on the west, taking off the bolts and angle bars that fastened the worn rail to the adjoining rails. When this was accomplished, the foreman gave orders that one of the laborers go to the east and plaintiff to the west and knock the rail in. The rail was tight, and usually when knocked loose would recoil or rebound. When plaintiff started to do this the foreman was opposite from the direction he was going. "When he told me to go and knock that rail loose, he called me and said, 'Walter, hurry up and get your bolts out and your angle bars off, and let's get this rail removed.' . . . In an effort to knock it loose at the end, I struck it some three or four times. I struck it with a ten-pound hammer. We usually use that size hammer for such work. I struck it as hard as I could. At the time I was knocking at the end of this rail with my hammer, I was standing with my back toward the foreman, Mr. Sigmon. I really don't know where he was then or what he was engaged in. . . . After I dealt these blows to the end of the rail and it wouldn't move, I stepped over inside. I thought there might be a spike that probably wasn't pulled. Sometimes where the timber was not so sound, the tie plate was cut down and the rail was wedged against the wood. Sometimes you have to cut the wood. If there are spikes, of course, they have to be removed before it will move. Just after I made the step the rail hit me. Just as I stepped over the rail I didn't see what the section foreman was doing as that rail struck me. At the time the rail struck me, the best I could tell it was rebounding. The rail struck my foot three times. It seemed like it paralyzed me for a moment so that I couldn't move, and when I did move, I found that my ankle was over. The rail rebounded, moved backwards and forwards, but I couldn't say how many times. To the best of my knowledge, it struck me three times. The rail couldn't possibly have rebounded before it was made loose in the position in which I was working at the time. It was not released by the blows which I dealt it at the end; it was released by some other means. . . . After I struck I saw Mr. Sigmon and Mr. Swafford standing near the center of the rail with crow-bars in their hands. They were on the outside of the rail. The rail had moved from them. . . . There was nobody else in a position that they could have moved the rail except Sigmon and this other hand with the crow-bars. . . . So we put this new rail that was going to take the place of the old one right there in a convenient place on the track where we were going to take out the old rail. This was the main line of the Southern Railroad, standard gauge track, and to the best of my knowledge, it is about 56 inches—four feet and eight inches, to be exact. This was a very sharp curve. As to your question, the greater the curve, the greater the danger from removing rails after being confined for some time, that they will kick back; that depends on how tight the track is. . . . I suppose John Swafford went to work at his end. I didn't see him. I couldn't do the work I was required to do there in a hurry and watch somebody else three feet away from me. Part of the time my back was to him and I was changing positions there. I don't know that I even glanced up while I was taking the bolts out to see what anybody else was doing. Why should I be interested in what they were doing? I was trying to do the work I was assigned to do, and I couldn't do that and watch what somebody was doing. I didn't see that it was necessary. When I saw the rail wouldn't move I looked to see what was the matter, and also to see what the foreman would say. When I looked up the rail struck me. . . . Q. If you had continued to stand where you were ordered to stand, and should have stood in order to knock this rail loose, you wouldn't have been injured? Answer: I don't know. I had orders to knock it loose. I didn't knock it loose. I knew that this rail that was to be removed was a tight rail. I knew that a tight rail might rebound. And knowing that, I was trying to remove it, and I had orders to remove it; that Swafford had orders to knock it loose at the east end, and without knowing what the other men were doing, I put my foot in there between this rail and the other rail on the track. I was doing my ordinary duties. . . . I was not there knocking any longer than it took to make three licks. When I turned around to step between the track I was facing south. And looking south, I couldn't see the other hands and see what they were doing. If I had looked up I could have seen them. I never saw them until after the rail struck me. They were standing near the center of the rail with bars in their hands. . . . At the time Mr. Sigmon told me to go to the west end of the rail and knock it loose with my hammer, he did not have the crow-bars under the rail. He was standing straight up. He didn't have his crow-bars at the rail to my knowledge. I was there where I could see him. Q. What notice, if any, did you have that the rail was going to be removed by the crow-bars until it was moved. A. I didn't know that it was going to be moved at all until it struck me. (Cross-examination): I said I didn't know the rail was going to be moved. I went there for the purpose of removing the rail. *I didn't know they were going to throw the rail over on top of me without warning me.* I saw the crow-bars laying around on the ground. Sigmon didn't have any crow-bars in his hands. I knew that in removing rails that were tight on a curve they used crow-bars, but they generally say something about it when they get ready to use them. That is the only time I ever knowed he missed it. *I depended on warning.* I knew they always used crow-bars in removing tight rails when they wouldn't come out by knocking with the hammer."

It was in evidence that plaintiff worked off and on for defendant as a laborer for some twenty-seven years, and the last five and a half years regularly.

John Swafford, one of the section crew, a witness for defendant, on cross-examination, was asked: "Do you think it is dangerous to shove a rail in with crow-bars without warning all the people within reach of it that it would be dangerous? Answer: Well, it is dangerous all right."

The evidence on the part of the defendant was to the effect that plaintiff was ordered to go to the west and on the north side of the worn or defective rail and knock the rail loose, and if he had obeyed these instructions he would not have been injured. That he knew at the time this order was given him that the foreman and another were using the crow-bars at the middle of the rail to prize the rail loose, and with this knowledge he stepped over between the rail being removed and the new rail, and was injured by his own negligence. That he knew from his experience the rail when released would recoil or rebound; that he abandoned the place of safety on the north side of the rail where he was ordered by the foreman to stand and knock the worn or defective rail loose, and with knowledge of the peril and risk abandoned his place of safety and voluntarily stepped into a place of danger and was injured, and assumed the risk.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff assume the risk as alleged in the answer? Answer: No.

3. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: Yes.

4. What damage, if any, is the plaintiff entitled to recover. Answer: $5,000."

D. L. Russell, Dillard S. Gardner and W. T. Morgan for plaintiff.

S. J. Ervin and S. J. Ervin, Jr., for defendant.

CLARKSON, J. The defendant, at the close of plaintiff's evidence, and at the close of all the evidence, made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled the motions, and in this we see no error. The defendant also in apt time, in writing, requested the court below to instruct the jury to answer the first issue "No" and the second issue "Yes." C. S., 565. The court below refused to give these instructions, and in this we can see no error.

It is admitted that when the injury occurred defendant was engaged, and plaintiff was employed by defendant, in interstate commerce. The action must be determined by the Federal Employers' Liability Act. *Cole v. R. R., ante,* 389.

"The decision of the United States Supreme Court upon the proper interpretation, construction, and effect of statutes regulating or affecting interstate and foreign commerce is conclusive upon all other tribunals when the same matters are called in question. And the decisions of the Federal courts are to be followed by the State courts, in the construction of the act." Richey, Federal Employers' Liability, (2 ed.), ch. 5, p. 33, sec. 20.

"Under section 1 of the act the employer is liable, other requisites being shown, for 'injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.' The act does not give a cause of action to the employee for injuries not occasioned by negligence, and no recovery can be had under this act by simply showing the injury, and that at the time the injured servant was engaged in interstate commerce." Richey, *supra,* p. 117-8; *R. R. v. Horton,* 233 U. S., 492, 59 Law Ed., 1062, 162 N. C., 424.

"By section 3 of the act it is provided that 'no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.' In other words, as to cases of this character, the defense of contributory negligence is wholly abolished." Richey, *supra,* p. 150-1.

"By section 4 of the act of 1908, it is provided that: 'In any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.' The defenses of assumed risk and contributory negligence have frequently been referred to and discussed by courts without making any discrimination between them. This is doubtless due to the fact that both have heretofore been treated in law as complete defenses in suits for personal injuries, and there was no necessity for observing the technical legal distinction. And while of little consequence when both led to the same result, it becomes important in actions founded upon the Federal act, which in ordinary cases recognized assumption of risk as a complete bar to the action, while contributory negligence merely mitigates the damages. Nor is it to be supposed that Congress in enacting the statute was ignorant of the distinction, because it is only through a distinction between contributory negligence and assumption of risk being recognized, that any, but a contradictory meaning would be expressed by sections 3 and 4." Richey, p. 167; *R. R. v. Horton, supra.*

"The general rule of the Federal courts as to assumption of risk is stated in the case of *Gila Valley, etc., R. Co. v. Hall,* 232 U. S., 94, as follows: 'An employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employee has a right to assume that his employer has exercised proper care with respect to providing a safe place of work, and suitable and safe appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employee becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. Moreover, in order to charge an employee with the assumption of a risk attributable to a defect due to the employer's negligence, it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person, under the circumstances, would have appreciated it.' A servant on accepting employment assumes all the ordinary and usual risks and perils incident thereto. The 'ordinary' risks are those which are a part of the natural and ordinary method of conducting the business and which are often recurring. The 'usual' risks are those which are common, frequent, and customary. Every risk which is not caused by a negligent act or omission on the part of the employer is an ordinary risk." Richey, p. 177-8.

It appears from the record, and there seems to be no dispute, that J. E. Sigmon was the foreman or boss and *alter ego* of defendant company, whose orders and directions plaintiff was in duty bound to obey. *Patton v. R. R.,* 96 N. C., 455; *Thompson v. Oil Co.,* 177 N. C., 279; *Davis v. Shipbuilding Co.,* 180 N. C., 74; *Robinson v. Ivey,* 193 N. C., 805.

From the law before stated, laid down by the Supreme Court of the United States, construing the Federal Employers' Liability Act, it will be noted that recovery is based on negligence as it exists at common law. *Cole v. R. R., supra.*

The plaintiff's evidence was to the effect that he was performing his duty in knocking the worn or defective rail loose with a hammer, as he was instructed by defendant's *alter ego* to do. When striking it a few blows it did not come loose and he stepped over inside to see if a spike probably was not pulled, or sometimes the timber (cross-ties) was not sound, the tie plate was cut down and the rail would become wedged against the wood and the wood would have to be cut. When he was ordered to do the work, Sigmon, the boss, and the other member of the crew did not have the crow-bars under the center of the worn or defective rail to prize it. He didn't know it was going to be moved by the crow-bars until he was struck. He was standing with his back to the foreman. He did not know that the rail was going to be thrown on him without warning—"I depended on warning." The testimony of defendant's witness, Sigmon, was to the contrary. The jury has taken plaintiff's version of how he was injured and we are bound by their finding. The evidence was sufficient to be submitted to the jury on the question of negligence, assumption of risk and contributory negligence.

"A servant does not assume the extraordinary and unusual risks of the employment, and he does not assume the risks which would not have existed if the employer had fulfilled his contractual duties. But only those risks are assumed which the employment involves after the employer has done everything that he is bound to do for the purpose of securing the safety of his servants, that is, he does not assume the risk of injury from the negligence of the master." Richey, p. 179.

Defendant cited the following cases in support of its motion to nonsuit, and for a directed verdict: *Tuttle v. R. R.,* 122 U. S., 189; *Aerkfetz v. Humphries,* 145 U. S., 418; *Boldt v. R. R.,* 245 U. S., 441; *R. R. v. Nixon,* 271 U. S., 218; *R. R. v. Allen,* 276 U. S., 169; *R. R. v. Koske,* 279 U. S., 11; *R. R. v. Davis,* 279 U. S., 37-8.

From an examination of the cases we do not think they are applicable to the facts in this case. The defendant in its brief, quoting the *Davis case,* says: "The principle enunciated in this case covers our case as with a garment," not from the finding of the jury taking plaintiff's testimony to be true. From the orders given by the foreman for one of the laborers to go to the east and plaintiff to the west and knock the rail in or loose, plaintiff in the performance of this ordinary duty with due care could presume that no other method, and especially one fraught with danger to himself, would be resorted to, the use of crow-bars by the foreman and a helper, unless notice was given him. The stepping in between the two rails to see why it did not release on knocking, a reason, being given, was not such assumption of risk that would as a matter of law bar a recovery. All of these were matters for the jury to determine.

The question asked on cross-examination of defendant's witness: "You think it is dangerous to shove a rail in with crow-bars without warning all of the people within reach of it, that it would be dangerous? Answer: 'Well, it is dangerous all right.'" Plaintiff excepted to this, but made no assignment of error. The exception cannot be considered, Rule 28, Rules of Supreme Court, 192 N. C., 853, yet we think it competent. The witness was an employee of defendant. "This is sometimes spoken of as the 'shorthand statement of a fact,' or as the statement of 'a composite or compound fact,' several circumstances combining to make another fact." *Marshall v. Telephone Co.*, 181 N. C., at 294. Our Court has allowed testimony to the effect that a different arrangement would have resulted in there being 'a source of danger eliminated.'" *Horne v. Power Co.,* 144 N. C., 378. That "a double chain would be safer than the single one." *Britt v. R. R.,* 148 N. C., 41; that a car used in manufacturing iron was "defective," *Alley v. Pipe Co.,* 159 N. C., 327; that a voltage of 110 was not "dangerous," *Monds v. Dunn,* 163 N. C., 110; that "I was walking just as careful as I could be." *Renn v. R. R.,* 170 N. C., at 141.

In *McCord v. Harrison-Wright Co.,* 198 N. C., at p. 745, the following was held competent: "It was supposed to be cut off and dressed up, too, because it was dangerous."

"When an inference is so usual, natural, or instinctive as to accord with general experience, its statement is received as substantially one of a fact—part of the common stock of knowledge." 22 C. J., p. 530; *Street v. Coal Co.,* 196 N. C., at p. 183.

The court below charged: "Now, there is another risk that an employee may assume, even though the injury is brought about by the negligence of the defendant, and that is where one is injured by the negligence of an employer where the result of the negligent act, the danger in which he is working, is so open and obvious that he can see it, observe it, and know the danger, the probability of danger to himself, even if it is the result of the negligence of the employer; when the employee sees the defect, sees the danger, faces the probability of danger to himself, understands it, observes it, and then if he continues to work under those conditions the law says he assumes the risk; that is, the probability of injury to himself, even though the defendant might be negligent. (If the probability of danger is greater than that of safety, or if it is so open and apparent, and there is such probability of injury that a man of ordinary prudence would not work under those conditions and he continues to work under them, the law says that he assumes the risk of the injury by continuing in the work, even though it is brought about by the negligence of the employer. That is what the law means by assumption of risk.)"

The latter part, in parentheses, is excepted to and assigned as error by defendant. Taking the charge of the court below as a whole, and defendant's prayers for instructions, among other phases, the following was given, viz.: "In the consideration of the second issue, the court instructs you that, the plaintiff in becoming a member of the defendant's section crew assumed, under the contract of employment, all the ordinary risks, hazards, and dangers of his employment and that, if he was injured in consequence of one of these ordinary risks, hazards, and dangers, that it would be your duty to answer the second issue, Yes."

We cannot hold from the authorities in the Federal Courts on the facts in this case, that this assignment of error can be sustained. "The principal element of assumed risk is knowledge. Of usual and ordinary risks this is presumed, but many of the risks previously noted as not being assumed, as negligence of the employer, and extraordinary risks, are assumed when the employee with knowledge thereof continues his employment without objection. This knowledge must be shown, and that the plaintiff appreciated or was bound to appreciate the risk. . . . But risks which are open and obvious or which in the exercise of ordinary care an employee would have discovered, he is presumed to know and assume. But by this it is not understood that the employee is under a duty to anticipate or take any precautions to discover a danger the result of negligence on the part of the employer or coemployees." Richey, *supra*, p. 180-1-2-3. As to the rule in this jurisdiction, see *Maulden v. Chair Co.*, 196 N. C., at p. 124.

The court below defined negligence, proximate cause, assumption of risk and contributory negligence, and applied the law applicable to the facts. The court below stated to the jury, "I am requested to give you some special instructions which I give you as instructions from the court." The court gave eight pages of instructions prepared by defendant, setting forth the defendant's contentions, covering every phase on each issue, and the charge on each issue was to the effect that the particular issue should be answered for defendant. The court gave in substance in the special instructions and in the charge substantially everything prayed for by defendant except nonsuiting plaintiff, and the prayer on all the evidence plaintiff could not recover. From the prayers asked for by defendant and given by the court below, the court "mighty near" charged plaintiff out of court. We do not think the charge subject to criticism under (Revisal, 535) C. S., 564.

The exception and assignment of error in reference to the charge as to "due care" cannot be sustained. This was premised on plaintiff's evidence. We think if the charge is taken as a whole, with defendant's prayers for instructions as given, and not disconnectedly, that in it there is no reversible or prejudicial error.

The court below seemed to have tried the case with "due care." In law we find

No error.

EDWARD C. KNIGHT, JR., v. HUMPHREYS LEWARK.

(Filed 10 September, 1930.)

1. **Trial F a—Where issue presents all material phases of controversy to jury it is sufficient.**

   Where an issue submitted to the jury is fairly determinative of the rights of the parties and presents all material phases of the controversy for the determination of the jury it is sufficient.

2. **Appeal and Error J g—Question of right to injunctive relief held immaterial on state of record in this case.**

   Where an action has been correctly determined in favor of the defendant on the theory of trespass, the question of the plaintiff's right to injunctive relief is immaterial.

APPEAL by plaintiff from *Small, J.*, and a jury, at March Term, 1930, of CURRITUCK. No error.

This is an action brought by plaintiff against the defendant, who prays for injunctive relief. Plaintiff alleges ownership. "That defendant wrongfully and unlawfully, and without the knowledge or consent of plaintiff, has begun the erection of a wharf or storehouse in the waters of the Currituck Sound in front of plaintiff's shore, about 300 yards from said shore and between the said shore and the deep waters and middle of the said sound."

The defendant answers and sets up adverse possession and "denies that the plaintiff has any right in the said water where the building is erected or in the lands under the water, and has no right to interfere with the defendant and no just cause of complaint against him. That the plaintiff is violating the law and extending what he calls a pier out from the shore line in the sound obstructing navigation, and this defendant further avers that the building which he has erected is not between any lands claimed by the plaintiff and the middle of Currituck Sound. That the said building is between parallel lines extending towards the middle of the sound owned by the United States Government as a lighthouse and is in about twenty-three yards of the lighthouse pier. That the plaintiff has no right in any of the property in the possession of the defendant or used by him upon which to erect his said boathouse and all allegations to the contrary . . . are denied. For further defense this defendant avers that the lands upon which his building is erected is in front of the lands belonging to the United States Government; that the defendant is a member of the Coast Guard; that he used for the Government this pier, and he and others used these small houses in front of the Government property with the consent and approval of the Coast Guard authorities, and have been using them for more than twenty-five years continuously, and that the plaintiff has no right in the waters where the building is located, and the lands under the water."

The issue submitted to the jury and their answer thereto, were as follows: "1. Has the defendant trespassed on the land of plaintiff, as alleged in the complaint? Answer: No."

McMullan & LeRoy and W. D. Pruden for plaintiff.
M. B. Simpson and Ehringhaus & Hall for defendant.

PER CURIAM. From a careful reading of the evidence we see no new or novel proposition of law involved in this controversy. It was a question of fact for the jury to decide and the evidence on the part of defendant was sufficient to be submitted to the jury on the contentions made by him.

The question as to plaintiff's right to injunctive relief presented by defendant is not material on the record. The case was tried on the theory of trespass. The issue was framed by the court below, and we think sufficient to present the material phase of the controversy between the parties. The jury has decided the issue of fact in favor of defendant. In law we find

No error.

PEARLY THOMPSON, ADMINISTRATRIX OF QUEEN THOMPSON, v. THE ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 10 September, 1930.)

Railroads D c—Contributory negligence of person walking on track held to bar recovery in action for wrongful death.

A pedestrian voluntarily using the track of a railroad company as a walkway for his own convenience is required to look and listen for approaching trains and to use due care for his own safety, and where in an action by an administratrix it appears that the deceased was in full vigor and in possession of his faculties, and that there was nothing in his condition to prevent him from seeing and hearing the defendant's train and getting off the track, the deceased's own negligence will bar a recovery by his administratrix.

APPEAL by plaintiff from *Sinclair, J.*, at June Term, 1930, of EDGECOMBE. Affirmed.

Action to recover damages for the wrongful death of plaintiff's intestate.

Plaintiff's intestate, about nineteen years of age, while walking on defendant's track, was struck and killed by one of its trains. There was no eye-witness of the occurrence. There was evidence tending to show that plaintiff's intestate was struck by defendant's train about 400 yards south of a public crossing, and that no bell was rung or whistle blown when the train approached and passed over the crossing. From the crossing to the place where the body of the deceased was found, the track was straight and the view of the engineer unobstructed. There was no evidence tending to show that plaintiff's intestate was down on the track, or that there was anything in his condition or situation which prevented him from getting off the track before the train struck him. He was a strong, able-bodied young man, on his way from his home to the factory at which he was employed. He had gone upon the railroad track voluntarily, instead of walking on the public road, which was parallel to the track. There was no evidence tending to show that he could not have seen and heard the train in ample time to have got off the track before the train struck him.

At the close of the evidence for the plaintiff, on motion of the defendant, the action was dismissed by judgment as of nonsuit. From this judgment plaintiff appealed to the Supreme Court.

H. D. Hardison and Henry C. Bourne for plaintiff.
Gilliam & Bond and Spruill & Spruill for defendant.

PER CURIAM. We find no error in the judgment dismissing this action. The judgment is supported by the decision of this Court in *Davis v. R. R.,* 187 N. C., 147, 120 S. E., 827. In the opinion in that case it is said: "The decisions in this State have been very insistent upon the principle that a pedestrian voluntarily using a live railroad track as a walkway for his own convenience, is required at all times to look and listen, and to take note of dangers that naturally threaten and which such action on his part would have disclosed, and if in breach of this duty and by reason of it, he fails to avoid a train moving along the track, and is run upon and killed or injured, his default will be imputed to him for contributory negligence and recovery is ordinarily barred." See cases cited.

There was no evidence at the trial of this action tending to show a situation upon which an issue involving the principle of "last clear chance" should have been submitted to the jury. *Redmon v. R. R.,* 195 N. C., 764, 143 S. E., 829. Conceding that there was some evidence tending to show negligence on the part of the defendant, all the evidence offered by the plaintiff showed that by his own negligence he contributed to the injuries which caused his death. Plaintiff is therefore barred of recovery in this action. *Neal v. R. R.,* 126 N. C., 634, 36 S. E., 117, 49 L. R. A., 684. The judgment is

Affirmed.

C. POOL WHITE v. VACA LAND AND LUMBER COMPANY.

(Filed 10 September, 1930.)

Process B d—Service of process on Secretary of State for foreign corporation not doing business here is void.

A summons served on the Secretary of State for a foreign corporation that at the time had no property in the State and was not doing business herein is a nullity, and upon motion before the clerk of the county wherein judgment against such corporation had been obtained by default, the judgment is properly set aside. C. S., 1137.

APPEAL by plaintiff from *Small, J.,* at May Term, 1930, of PASQUOTANK. Affirmed.

Motion, on special appearance, to have a judgment declared of no effect and to dismiss the action for want of jurisdiction. The facts are as follows:

1. That the original summons in this action was issued on 30 May, 1929, and was received by the sheriff of Wake County on 16 July, 1929, and attempted to have been served by said sheriff on 16 July, 1929, and that said receipt by said sheriff of Wake County and attempted service by said sheriff was more than 30 days after issuance of said summons out of Pasquotank County by the clerk; that said summons was returned to Pasquotank County after 16 July, 1929, and that said attempted service was not made within 10 days after its issuance; that said attempted service was done by delivering a copy of the summons and complaint to J. A. Hartness, Secretary of State.

2. The court further finds as a fact that the defendant, on 2 August, 1929, after written notice to the plaintiff, according to law, moved before N. E. Aydlett, clerk Superior Court of Pasquotank County, upon a special appearance, to dismiss the action, which dismissal the clerk granted. That, at said hearing, the plaintiff moved for an alias summons and the clerk denied said motion; that, to said order and ruling of the clerk, the plaintiff in apt time excepted and appealed. Notice of appeal was given in open court and further notice was waived. That, at October Term, 1929, the motion on appeal was heard before Judge Clayton Moore, and Judge Moore ordered an alias summons be issued by the clerk of the court of Pasquotank County. That a summons issued out of Pasquotank County on 27 January, 1930, marked "Alias Summons." That same was received on 31 January, 1930, and served on 31 January, 1930, on J. A. Hartness, Secretary of State, by N. F. Turner, sheriff of Wake County. That there is nothing to indicate connection of the summons of 31 January, 1930, with the summons of 30 May, 1929, other than the caption of the summons and the word "Alias" written above the word "Summons."

3. The court further finds as a fact that on 10 March, 1930, the clerk entered judgment by default against defendant in favor of plaintiff in the sum of $800, together with interest and the costs.

4. That on 10 April, 1930, defendant company gave notice of special appearance and motion to vacate the above judgment and to dismiss the action; service of such notice was accepted by attorney for the plaintiff. That motion was made on 21 April, 1930, and judgment entered by the clerk vacating the judgment, and dismissing the action.

5. The court finds as a fact, and this finding is made by agreement of all parties to this action, that the property of the defendant, situate in Gates County, was conveyed by defendant on 18 June, 1929, and said deed was filed for registration on 21 June, 1929, at 2:30 o'clock p.m., and registered 21 June, 1929, in the register of deeds office in Gates County, North Carolina, conveying the lands of the defendant to Richmond Cedar Works.

6. The court further finds as facts: That since the conveyance of the aforesaid property (to wit, on 18 June, 1929), the defendant has owned no property in North Carolina, nor done any business in said State.

7. It is agreed by both plaintiff and defendant, and the court finds it as a fact, that the defendant is a foreign corporation.

It was adjudged that at the time of the attempted service of summons on the Secretary of State, on 16 July, 1929, the defendant owned no property and was not doing business in North Carolina; that service by the sheriff of Wake County of the paper marked in ink over the printed word "Summons," on the Secretary of State was not a service of process on the defendant and did not give the court jurisdiction, the defendant owning no land and doing no business in North Carolina; that the judgment of the clerk rendered 10 March, 1930, is a nullity; that it be canceled, and that the action be dismissed. The plaintiff excepted and appealed.

George J. Spence for appellant.
Worth & Horner for appellee.

PER CURIAM. The essentials of jurisdiction are these: (1) The court must have cognizance of the class of cases to which the one to be adjudged belongs; (2) the proper parties must be present; (3) the point decided must be, in substance and effect, within the issue. *Thompson v. Humphrey,* 179 N. C., 44, 55; McIntosh's Prac. & Pro., sec. 6.

In this case the second essential is lacking; the defendant was not in court. Every corporation having property or doing business in this State, whether incorporated under its laws or not, shall have an officer or agent in this State upon whom process in all actions or proceedings against it can be served, and if it has no such agent process may be served by leaving a copy with the Secretary of State. C. S., 1137; *Lunceford v. Association,* 190 N. C., 314.

The defendant is a foreign corporation. It neither owned property nor was doing business in the State when the first or the second attempted service of process was made on the Secretary of State. This question was not before Judge Moore. He merely held that the motion for an alias summons was made within the time allowed by the law.

Judgment affirmed.

YANCEY KELLER v. CALDWELL FURNITURE COMPANY.

(Filed 17 September, 1930.)

1. **Negligence D b—Evidence in this case held admissible as tending to show that plaintiff's injury affected his earning ability.**

In this action to recover damages for an alleged negligent personal injury evidence is held competent as tending to show that the plaintiff's injury affected his ability to perform physical labor and to earn money under the authority of *Hargis v. Power Co.*, 175 N. C., 31, and other like cases. *Shepherd v. Lumber Co.*, 166 N. C., 130, cited and distinguished.

2. **Evidence D f—Witness may explain answer to question asked to impeach his credibility although explanation relates to defendant's liability insurance.**

Where, upon the trial of an action to recover damages for an alleged negligent personal injury, the defendant's counsel has asked the plaintiff on cross-examination, to impeach his credibility as a witness, "Why did you quit?" (the employment of defendant), which is answered, "They ran me off," it is competent for the plaintiff to further testify by way of explanation that he was told that "the insurance company would not let him work," this being an exception to the rule that evidence that the defendant carried liability insurance is inadmissible, and testimony in corroboration of such explanation given by another witness is also competent.

3. **Trial E e—In this case held: exception to omission from charge of requested instructions should have been made before verdict.**

Where the defendant has privately requested the court to give certain instructions, and this request is overlooked by the court in his charge to the jury, and the defendant fails to call attention to the inadvertence, an exception taken for the first time after verdict is too late, and will not be considered on appeal.

4. **Evidence K c—Nonexpert witness may testify from his own observation that certain machinery was not approved and in general use.**

Where the plaintiff has been injured while working at the defendant's machine, and seeks to recover damages therefor, it is not required that a witness be an expert in order to testify as to whether the machine that injured the plaintiff was approved and in general use, it being sufficient if the witness testify from his own knowledge and experience in such matters.

5. **Evidence G c—Testimony of declaration of deceased father of plaintiff as to date of plaintiff's birth held competent.**

Where there is a presumption that the father of the plaintiff is dead, testimony of his declarations as to the plaintiff's age, material to the controversy, made *ante litem motam*, is competent, and where the evidence discloses that the plaintiff's father disappeared soon after the plaintiff's birth and his mother had married again, it is sufficient to admit declarations of this character.

6. **Trial E b—Charge of trial court held not to contain expression of opinion as to weight and credibility of evidence.**

   A correct charge of the court upon the evidence in a case will not be held for error as containing an expression of opinion prohibited by C. S., 564, when nothing of this character appears from a careful perusal of the charge on appeal that could bias a mind of ordinary firmness and intelligence.

7. **Judgments K a—Consent judgment entered into by next friend of minor may be impeached in action by minor after becoming of age.**

   A judgment by consent, signed and entered by the court upon the agreement of the next friend bringing the action for a minor, where there is no legal determination by the court of the matter in controversy, no evidence introduced and no issues submitted to a jury, may be impeached in an action brought by the minor after becoming of age in which it is presented as a defense.

APPEAL by defendant from *Harding, J.,* at January Special Term, 1930, of CALDWELL. No error.

Action for damages for personal injury. At the time of his injury the plaintiff was a minor and an employee of the defendant. He was engaged in the work of tailing a planer, *i. e.,* "taking away the timbers after they went through the machine." The planer was run by a belt and pulley. The pulley was very near the floor and was not incased. There is evidence that the floor was greasy and uneven. The plaintiff's narrative of the injury is as follows: "When we got the truck rolled up to the machine I started around to my place where I was to be, and just as I made the turn to go around the floor I stepped on a block and my foot came out from under me and the pulley caught me by the foot and slung me 10 or 12 feet." It became necessary to amputate his right foot. Other relevant facts are set out in the opinion.

Issues as to the defendant's negligence, the plaintiff's contributory negligence, the statute of limitations, the bar of a judgment in a former action, and damages were answered in favor of the plaintiff. Judgment for the plaintiff and appeal by the defendant.

Mark Squires and W. A. Self for appellant.
D. L. Russell and W. C. Newland for appellee.

ADAMS, J. The first five exceptions are without substantial merit. The testimony to which they relate was admissible as tending to show that the plaintiff's injury affected his ability to perform physical labor and to earn money. *Wallace v. R. R.,* 104 N. C., 442; *Hansley v. R. R.,* 115 N. C., 611; *Rushing v. R. R.,* 149 N. C., 161; *Hargis v. Power Co.,* 175 N. C., 31. The exceptions are not within the principle stated in *Shepherd v. Lumber Co.,* 166 N. C., 130.

The second assignment of error questions the competency of evidence and the propriety of remarks made by one of the plaintiff's attorneys in his address to the jury. The plaintiff was under cross-examination. He testified that after he was hurt he worked for the defendant. The defendant's counsel then asked, "Why did you quit?" The plaintiff answered, "They ran me off; said the insurance wouldn't allow them to work me." The defendant's motion to strike out the answer was denied. Exception 7.

On his direct examination Joe Whisnant, stepfather of the plaintiff, testified after objection by the defendant, that Mr. Beard, superintendent of the factory, told him that the insurance company would not allow the defendant to keep the plaintiff in its service. Exception 10.

In the concluding argument one of the counsel for the plaintiff used substantially this language: "The plaintiff told (the defendant's attorney) that the insurance company would not let him work. What has the insurance company got to do with the case? Since when has it happened that the insurance company can say who can and who cannot work for the Caldwell Furniture Company? I cannot see what they have to do with it." The defendant's counsel privately requested the judge to tell the jury in his charge "not to consider the insurance company." The request was overlooked. Counsel for the defendant was present when the charge was given and did not except, but entered an exception at the time of settling the case on appeal. Exception 27-A.

The defendant argued that the evidence excepted to was an indirect method of informing the jury that the defendant had insurance which, in case of the plaintiff's recovery, would indemnify it against loss. This Court has been insistent in its disapproval of any attempt by the plaintiff, in an action for personal injury or death, to prove that the defendant had insurance protecting it from the consequences of its own negligence. In *Lytton v. Manufacturing Company,* 157 N. C., 331, evidence that the defendant in an action for damages arising from personal injury was insured in a casualty company was held to be incompetent because it was entirely foreign to the issues raised by the pleadings—a position maintained in several subsequent decisions. *Featherstone v. Cotton Mills,* 159 N. C., 429; *Starr v. Oil Company,* 165 N. C., 587; *Luttrell v. Hardin,* 193 N. C., 265. In these cases the evidence was offered by the plaintiff. The annotation in 56 A. L. R., 1418, contains an exhaustive review of the cases on this subject. On page 1432 it is said: "The general rules and principles applicable to the question of the admissibility of evidence, in a negligence action, of the fact that the defendant therein carries liability or indemnity insurance protecting him from the consequences of negligence, are settled beyond dispute, but like most other rules of evidence, they are subject to qualifications and exceptions." The principle relating to the qualification of the rule is stated by *Hoke, J.*, in *Bryant v. Furniture Co.*, 186 N. C., 441, as follows: "It has been held in this State that in a trial of this kind the fact that a defendant company charged with negligent injury held a policy of indemnity insurance against such a liability is ordinarily not competent, and when received as an independent circumstance relevant to the issues, it may be held for prejudicial error. And if brought out in the hearing of the jury by general questions asked in bad faith and for the purpose of evasion, it may likewise be held for error. On the contrary, if an attorney has reason to believe that a juror, tendered or on the panel, has pecuniary or business connection naturally enlisting his interest in behalf of such a company, it is both the right and duty of the attorney in the protection of his client's rights to bring out the facts as the basis for a proper challenge, or if in the course of the trial it reasonably appears that a witness has such an interest that it would legally affect the value of his testimony, this may be properly developed, and where such a fact is brought out merely as an incident, on cross-examination or otherwise, it will not always or necessarily constitute reversible error when it appears from a full consideration of the pertinent facts that no prejudicial effect has been wrought."

The application of the modification is given in *Davis v. Shipbuilding Co.*, 180 N. C., 74, in which it was held, upon the defendant's denial of the plaintiff's employment, that the fact that the defendant held indemnity insurance for injury to its employees was competent as tending to show that the plaintiff was in its service.

In the case at bar the evidence excepted to (Exception 7) was evoked by the defendant. If a witness gives an answer which is not responsive to a question, the proper course is a motion to strike out the answer or to instruct the jury to disregard it. *Hodges v. Wilson*, 165 N. C., 323; *Godfrey v. Power Co.*, 190 N. C., 24, 31. This motion was made. But the plaintiff's answer was a direct response to the defendant's question, "Why did you quit?" If the answer had been confined to the words, "They ran me off," the plaintiff's testimony would have been subject to grave impeachment. It would have worked serious if not irreparable injustice to him to exclude the reason given by the defendant for turning him off. He was entitled to an opportunity to counteract the damaging effect of the question which was manifestly intended to weaken his testimony, by reciting in its entirety the reason given by the defendant.

On the same principle the tenth exception must be overruled. It was said in *S. v. Bethea*, 186 N. C., 22, that when the credibility of a witness is impugned by cross-examination tending to impeach his veracity or his relation to the cause, it is permissible to corroborate his credibility and to restore confidence in his veracity. Such corroborating evidence may include previous statements whether made pending the controversy or *ante litem motam. Dellinger v. Building Co.*, 187 N. C., 845. The object of the cross-examination was to impair or discredit the plaintiff's version of the injury; and in corroboration of what he had said it was legitimate to prove by Joe Whisnant that the defendant's superintendent told him the plaintiff had been discharged for the identical reason the defendant had given the plaintiff. The superintendent's statement may not have been competent as substantive evidence against the defendant, but it was competent in corroboration; if competent for any purpose there was no error in refusing to exclude it.

Exception 27-A is likewise untenable. The defendant's counsel expressly declined to interrupt the concluding argument to the jury and relied upon his private understanding with the judge. He heard the charge, and not only failed to call attention to the court's inadvertence, but entered no exception until the case on appeal was settled. The exception should have been taken before the verdict was returned. *S. v. Tyson,* 133 N. C., 692; *S. v. Davenport,* 156 N. C., 596, 612.

Assignments 5 and 12 include exceptions 11, 12, 13, 18, 19, 20, 28, and rest upon the assumption that Joe Whisnant and John Whisnant were permitted to say whether certain appliances were approved and in general use without qualifying as experts. The testimony of these witnesses did not involve a question of science or a conclusion to be drawn from a hypothetical statement of facts; it was elicited as a matter within their personal knowledge, experience, and observation. The exception to the general rule that witnesses cannot express an opinion is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill or learning; it includes the evidence of common observers testifying to the results of their observation. *Britt v. R. R.,* 148 N. C., 37; *Marshall v. Telephone Co.,* 181 N. C., 292.

Exceptions 14, 15, 16, 17. The age of the plaintiff being in controversy the court admitted in evidence the declarations of the plaintiff's father on this point. He told John Whisnant in 1908 that the plaintiff was born 31 January, 1906. The plaintiff testified that this was the date of his birth; that his father disappeared when he was a boy, and that several years thereafter his mother married the second time. There is a presumption that the plaintiff's father is dead and his declaration, made *ante litem motam,* was competent on the fact in issue. *Clements v. Hunt,* 46 N. C., 400; *Norris v. Edwards,* 90 N. C., 383; *Ewell v. Ewell,* 163 N. C., 234; *Jelser v. White,* 183 N. C., 126; *Beard v. Sovereign Lodge,* 184 N. C., 154.

Assignments 13, 14, 15, 16, 17, 18 are based upon the contention that the presiding judge inadvertently disregarded the provisions of C. S., 564, and influenced the verdict by impressing the minds of the jurors with the idea that the defendant was knowingly guilty of a crime when it employed the plaintiff; that the plaintiff was immune from the charge of contributory negligence; and that in reality the quantum of damages was the only issue to be determined. The legal principles contained in the instructions are not impeached; but it is insisted that the jury must have understood the instructions as the intimation, if not the expression, of an opinion which was hostile to the defendant.

The court has endeavored to maintain the integrity of section 564 by the strict observance of its provisions, holding that the statute is mandatory and that any expression of opinion by the trial judge during the trial may be excepted to after the verdict is returned. *S. v. Ownby,* 146 N. C., 677; *S. v. Rogers,* 173 N. C., 755; *Greene v. Newsome,* 184 N. C., 77; *S. v. Bryant,* 189 N. C., 112; *S. v. Sullivan,* 193 N. C., 754.

Our interpretation of the charge does not justify the appellant's conclusion. We have discovered nothing in the instructions which should bias a mind of ordinary firmness and intelligence or in anywise detract from the quality described by counsel for the appellant as "the fine sense of right characterizing the trial judge."

In November, 1919, a consent judgment was signed in an action pending in the Superior Court of Caldwell County entitled "Yancey Saunders (the present plaintiff) by his next friend, Mary Whisnant, *v.* Caldwell Furniture Company." The complaint was filed on behalf of the plaintiff for his injury and on behalf of his mother for the loss of his services. The judgment was not based upon an actual investigation of the facts. No answer was filed, no evidence was introduced, no issues were submitted to the jury. The judgment was signed by the judge who tried the case now under consideration. In the present case he held that as to the plaintiff, who was then a minor, the consent judgment was void. The defendant paid the judgment by a check given to "Mary Whisnant, next friend of Yancey Keller." The plaintiff testified that he had never received any part of the check.

The question raised by the exception has been determined adversely to the defendant's contention. In *Ferrell v. Broadway,* 126 N. C., 258, the Court said: "But it may be taken to be the law that, in a case where issues are joined between infants on one side and the adverse party and no evidence is introduced, and nothing is done or said on the trial except that an agreement is entered into by the next friend or counsel of the infants, that the verdict shall be rendered against the infant, the verdict and judgment will not bind the infants. In such a case, the court would have no knowledge of the facts, and therefore could not exercise any supervision over the interest of the infants. The object in having a next friend appointed for infants is to have their rights and interests claimed and protected, and the next friend or their counsel will not be permitted to yield their rights to others by a consent verdict and judgment where the court has exercised no supervision over the arrangement." The case was reheard (127 N. C., 404) on a different ground, but as pointed out in *Rector v. Logging Co.,* 179 N. C., 59, the principle set out in the quotation above was in no wise modified or questioned. On the contrary it was approved in the case last cited, the Court, in an opinion delivered by *Hoke, J.,* saying in effect that the principle was against the validity of the compromise judgment, but deferring final decree because in his replication the plaintiff had raised an issue of fraud. The Court has also approved the principle that the compromise can be impeached upon the trial of the action in which it is presented as a defense. *Bunch v. Lumber Co.,* 174 N. C., 8.

The remaining exceptions, including the motion for nonsuit, call for no discussion. We find

No error.

BRENT RHYNE, GUARDIAN OF R. H. RHYNE, v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 17 September, 1930.)

Insurance J c—Failure to give immediate notice of disability will not work forfeiture where insured is incapable of giving such notice.

Where a clause in a policy of life insurance provides for a waiver of premiums and the payment to the insured of a certain amount of money monthly in case of permanent and total disability upon due notice and proof of such disability to be given the insurer before the time for the payment of the next premium after the beginning of the disability, failure to give such notice within the time specified will not work a forfeiture if the insured is under such disability as to incapacitate him from giving such notice, and his failure is not attributable to any fault of his, *Rhyne v. Insurance Co.,* 196 N. C., 717, cited and applied as the law of the case.

CIVIL ACTION, before *Lyon, Emergency Judge,* at July Term, 1929, of BURKE.

The facts necessary to an understanding of the principles of law involved are set forth in the former appeal reported in 196 N. C., 717.

The following issues were submitted to the jury:

1. "Did R. H. Rhyne, on or about 1 February, 1927, become wholly and continuously disabled from bodily injuries or disease whereby he was and will be permanently, continuously and wholly prevented thereby from pursuing any occupation whatsoever for remuneration or profit? If so, when?"

2. "If so, did he file or cause to be filed with the defendant due proof of such disability after the payment of the first premium and before default in the payment of any subsequent premium on each of the policies in controversy?"

3. "If he did not file such proofs, was the said R. H. Rhyne, on 20 February, 1927, and for thirty days thereafter, so insane as to be incapable of knowing that he had insurance policy number 267701 issued by the defendant, that he was required to pay a premium thereon on said date or within thirty days thereafter, and that he was totally and permanently disabled, and that he was required by the terms of said policy to furnish the defendant due proof of such disability prior to default in the payment of any premium on said policy?"

4. "If he did not file such proofs was R. H. Rhyne, on 15 June, 1927, and for thirty days thereafter so insane as to be incapable of knowing that he had insurance policy No. 288280, issued by the defendant, that he was required to pay a premium thereon on said date or within thirty days thereafter, and that he was totally and permanently disabled and that he was required by the terms of said policy to furnish the defendant due proof of such disability prior to default in the payment of any premium on said policy?"

5. "What sum, if any, is the plaintiff entitled to recover of the defendant upon the cause of action set forth in the complaint?"

The jury answered the first issue "Yes, 1 February, 1927"; the second issue "No"; the third issue "Yes"; the fourth issue "Yes," and the fifth issue "$75.00 per month from 1 February, 1927, to 4 January, 1928."

From judgment upon the verdict the defendant appealed.

John M. Mull and Avery & Patton for plaintiff.
Brooks, Parker, Smith & Wharton and Ervin & Ervin for defendant.

Brogden, J. The former appeal in this case, reported in 196 N. C., at page 717, contained the following declaration: "There was evidence from which the jury could find that the assured became insane in January or February, 1927, during the life of the policies in suit." The evidence for the plaintiff in the present case is substantially the same as that introduced at the former trial and referred to in the former appeal. Hence, unless the Court shall overrule the former decision in this case, the principle of "Law of the case" would apply to this appeal and thus determine the merits of the controversy.

The question then, is, was the former appeal correctly decided?

It is conceded that the decisions upon the proposition as to how far the insanity of the insured will excuse failure to furnish proof of disability, are not uniform and have been built upon divergent theories of liability, thus working out variable conclusions of law. One of the first cases dealing with the subject was *Fire Insurance Co. v. Boykin,* 79 U. S., 349, 20 Law Ed., 442. In that case an insane man furnished proof of loss by affidavit to a fire insurance company to the effect "that he believed the building had been set on fire by an incendiary; that he had heard of repeated threats of a person whom he named that he would burn the premises, and that it was in consequence of these threats that he had procured the insurance which he was then seeking to recover." When this affidavit was received by the insurance companies they refused to pay and notified the insured that they considered the policy void. The contention was made that the insured was insane when he wrote the affidavit. The Court said: "If he were so insane as to be incapable of making an intelligent statement, this would, of itself, excuse that condition of the policy." The *Boykin case* is cited with approval in *Hirsch-Fauth Furniture Co. v. Continental Ins. Co.,* 24 Fed. (2d), 216. The Court said: "In reply to the suggestion that the insured who, being insane, failed to file proof of loss within the time limit stated in the policy, could not recover, it was said that such a proposition is too repugnant to justice and humanity to merit serious consideration." The *Boykin case* was also cited with approval in *Hartford Fire Ins. Co. v. Doll,* 23 Fed. (2d), 443. In that case the insurance policy provided: "If fire occur the insured shall within six days give notice of any loss thereby in writing to this company." The insured was injured in a tornado, was unconscious for some days, blind for several weeks and confined in a hospital. It is to be noted that the foregoing cases involve liability for failure to give notice of destruction of property by fire.

The Supreme Court of Michigan considered the question in *Reed v. Loyal Protective Asso.,* 117 N. W., 600. The notice clause was as follows: "Unless notice of any injury or of the beginning of any sickness is received in writing at the home office of this association in Boston, Massachusetts, on or before the expiration of fourteen days from the commencement of such disability, . . . the claim shall be valid only for the period dating from the actual time the notification is received at the home office." The insured was injured by a fall in October and the notice was not filed until 1 December. The insurance company contended: (1) That the contract is an unconditional agreement as to notice, and not subject to a construction, which does violence to its plain terms. (2) If this construction was a proper one, the plaintiff had not proved such derangement, and the proof conclusively shows the opposite." The Court held that there was no evidence of mental derangement, but in view of a possible new trial, the Court proceeded to consider the question as to whether failure to give notice by reason of mental incapacity, would excuse the forfeiture. The Court said: "But we are committed to the doctrine in insurance cases, that a provision requiring a notice on pain of forfeiture will not be construed to require strict performance, when by a plain act of God it is made impossible of performance."

The Supreme Court of Nebraska discussed the principle of law involved in the case of *Woodmen's Accident Association v. Byers,* 87 N. W., 546. In that case the plaintiff undertook to recover upon a total disability contract of insurance. The policy stipulated "that as a condition precedent to any liability thereunder, the plaintiff shall give a written notice to the defendant at its home office in Lincoln, Nebraska, of any injury received for which indemnity is claimed, within ten days from date of such injury." The accident occurred on 17 October, and the notice was mailed to the defendant the following November. The Court said: "A company of this character, organized for the purpose of providing indemnity to those suffering injury and loss from accident, should, and, we assume does, have a higher mission than merely the collection of revenues. If the provision quoted must under all circumstances, and regardless of conditions, be absolutely and strictly complied with according to the letter thereof, then the contract can only be regarded as a snare and pitfall sure to entrap the unwary and deprive them of the protection and indemnity contracted for on their part in the best of faith and honesty of purpose. If the contract is legally incapable of any other construction than that contended for, requiring a literal and exact compliance as a condition precedent to be performed in the time mentioned, then if for eleven days the insured is irrational and deranged in his mind as a result of the accident, as he appears to have been, and therefore incapable of complying with this provision, he would be altogether debarred from relief, and the failure would, on legal principles, be as fatal as would be the case if the time were forty-four days, as in the present instance. Such a construction would be shocking to our sense of justice, unconscionable, and unreasonable."

The language employed by the Nebraska Court is perhaps stronger than that contained in any other case, but it tends to show the divergent attitude of the courts upon the question involved.

The *Byers case, supra,* was followed in *Marti v. Midwest Life Insurance Co.,* 189 N. W., 388.

The Supreme Court of South Carolina passed upon the question in *Levan v. Metropolitan Life Insurance Co.,* 136 S. E., p. 304. The trial judge charged the jury "that if at the time the unpaid premium became due Levan was totally and permanently disabled as defined in the policy, and was incapable of furnishing proofs of his disability by reason of disability itself, and that the beneficiary complied with the policy provisions with reasonable promptness under all circumstances, then the policy would not be considered forfeited for nonpayment of premium." The Court approved the instruction and quoted from the Supreme Court of Georgia as follows: "It is settled by an overwhelming weight of authority that where the failure to give prompt notice is not due to the negligence of the insured or the beneficiary, but such compliance has been prevented and rendered impossible by an act of God, this would furnish a sufficient legal excuse for the delay in giving the stipulated notice; and this doctrine has been applied in cases in which a specified time for the giving of the notice has been fixed by the contract." In support of the conclusion, the Court cited various decisions, including the *Reed* and *Boykin cases.*

The Supreme Court of Kentucky followed the principles of law announced in the foregoing cases in *Metropolitan Life Insurance Co. v. Carroll,* 273 S. W., 54. See, also, *Nelson v. Jefferson Standard Life Insurance Co., post,* 443.

The defendant relies strongly upon the following cases, to wit: *New England Mutual Life Insurance Co. v. Reynolds,* 116 Southern, 151; *International Life Insurance Co. v. Moeller,* 33 Fed. (2d), 386; *New York Life Insurance Co. v. Alexander,* 85 Southern, 93; *Thorensen v. Mass. Benefit Association,* 71 N. W., 668. In the *Thorensen case* no reason or excuse is given for failing to give the notice within the time required. The *Alexander case* was distinguished in *Levan v. Metropolitan Life Insurance Company.* In the *Moeller case* there was no evidence indicating insanity or physical incapacity. The Court said, referring to the testimony of certain witnesses for plaintiff: "They pictured a man who had made a losing fight with tuberculosis. Their story awakens our sympathetic impulses, but it is devoid of facts indicating insanity or physical incapacity on Keller's part in August, 1914."

The *Reynolds case* is directly in point and supports in every respect the conditions and construction of law urged by the defendant. There are other cases which support the defendant's contention, but after a diligent and painstaking investigation of the decisions, we have come to the conclusion that the *Rhyne case* rests upon a solid legal foundation, and that the principles of liability therein declared are in accordance with the weight of authority.

The contract of insurance expressly provided that: "If, after one full annual premium shall have been paid on this policy, and before default in the payment of any subsequent premium, the insured shall furnish to the company due proof that he has been wholly and continuously disabled by bodily injuries or disease, and will be permanently, continuously and wholly prevented thereby from pursuing any occupation whatsoever for remuneration or profit, provided that such total and permanent disability shall occur before the anniversary of the policy on which his age at nearest birthday is 60 years, the company by endorsement in writing on this contract will agree to pay: (a) The premiums which shall become payable after receipt and approval of proof of said disability and during continuance thereof. (b) Monthly income during the lifetime of the insured, . . . of 1 per cent of the face amount of this policy." Manifestly, the policy insured against total disability occasioned by disease. The very disease insured against having produced mental incapacity to give the notice required, the guardian of the plaintiff, under the principles of law announced, was entitled to recover.

The jury found that on 20 February, 1927, the insured was so insane as to be incapable of knowing that he had insurance or that he was required to pay a premium thereon. There was sufficient evidence to be submitted to the jury. The defendant offered strong evidence tending to show that the insured had sufficient mental capacity to give the necessary notice, and the jury would have been justified in so finding, but an issue of fact having been raised by the evidence, the verdict is conclusive of the controversy.

There are other exceptions presented by the record, but none of them warrant a new trial.

No error.

F. R. DOGGETT v. ROSA LEE DOGGETT VAUGHAN.

(Filed 17 September, 1930.)

1. **Wills E c—In order for rule in Shelley's case to apply the devisee must take in character as well as in quality of heir.**

   In order for the rule in *Shelley's case* to apply, those who are to take an estate under a devise must do so in the character and in the quality of heir in accordance with the canons of descent, and where, taking a part of a clause of a will, the rule would be applicable, it will not prevail when construing the entire clause the evident intent of the testator appears to the contrary.

2. **Wills E b—Under the devise in this case the devisee took a life estate only with remainder to her children.**

   Construing a devise of lands to the testator's three daughters by name for life and at their death to the heirs of their bodies in fee simple forever, the land to be divided equally between them after the testator's death, with further provision that if either daughter die without a living heir of her body her share should be divided between all of the testator's children then living, or having living issue: *Held*, the controlling intent of the testator was not to give his daughters a fee-simple estate in the lands devised, but a life estate only, and at the death of a daughter leaving two surviving children, such children take a fee simple in their mother's share as tenants in common, and the rule in *Shelley's case* does not apply.

APPEAL by plaintiff from *Devin, J.*, at June Term, 1930, of VANCE.

Petition for partition. Plea of sole seizin. Judgment on the pleadings. Plaintiff appeals.

Pittman, Bridgers & Hicks for plaintiff.
A. A. Bunn for defendant.

STACY, C. J. The case presents for construction the following clause in the will of James T. Floyd:

"I give and bequeath to my three daughters, Ella, May and Florence during their natural lives, all the rest of the land I may die possessed of, and after their death, I desire that the shares of each one shall go to the heirs of her body in fee simple forever, and I desire that after my death my three daughters divide this land between themselves equally—and if either of my daughters should die without a living heir of her body, it is my will that her share of the land shall be equally divided between all of my children that may be living, or have living issue."

The testator left sons, as well as daughters, him surviving, but only the share of one of the daughters, Florence Floyd Doggett, who was allotted fifty-nine acres of land under and by virtue of the above clause in her father's will, is involved in the present proceeding. Plaintiff and defendant are the sole surviving children of Florence Floyd Doggett, and it is conceded that if said devise give to each of the three daughters, mentioned therein, a life estate only in the share allotted to her, with remainder in fee to her children, then plaintiff and defendant are tenants in common of the *locus in quo*. But if the devise in question operate to give to each of the first takers an estate in fee, then the defendant's plea of sole seizin is good, the entire tract allotted to her mother having been devised to her.

The controversy, therefore, turns on whether the limitations in the above clause of the will of James T. Floyd are so framed as to attract the rule in *Shelley's case*, which says, in substance, "that if an estate in freehold be limited to A., with remainder to his heirs, general or special, the remainder, although importing an independent gift to the heirs, as original takers, shall confer the inheritance on A., the ancestor." *Martin v. Knowles*, 195 N. C., 427, 142 S. E., 313.

The devise is to the testator's three daughters for and during the term of their natural lives and after the death of any one of the daughters, it is provided that her share "shall go to the heirs of her body in fee simple forever." Had the will stopped here, a typical case for the operation of the rule would have been presented, for, as said by *Black, J.,* in *Steacy v. Rice,* 27 Pa. St., 95, 65 Am. Dec., 447, "the law will not treat that as an estate for life which is essentially an estate of inheritance, nor permit any one to take in the character of heir unless he takes also in the quality of heir." *Hartman v. Flynn,* 189 N. C., 452, 127 S. E., 517; *Bank v. Dortch,* 186 N. C., 510, 120 S. E., 60. In other words, as an *heir* is one upon whom the *law* casts an estate at the death of the ancestor (II Blackstone, ch. 14), and as it is necessary to consult the law to find out who the heir of the ancestor is, the law, speaking through the rule in *Shelley's case,* in substance, says: "He who would thus take in the character of heir must take also in the quality of heir; that is, *as heir* by descent under the law and not by purchase under the instrument." *Yelverton v. Yelverton,* 192 N. C., 614, 135 S. E., 632.

But immediately the testator added: "I desire that after my death my three daughters divide this land between themselves equally—and if either of my daughters should die without a living heir of her body, it is my will that her share of the land shall be equally divided between all of my children that may be living or have living issue." Construing this limitation in the light of the whole clause, it would seem that the testator did not intend to give his daughters fee-simple estates in the residuary property, but life estates only, and that he further intended for the children of each of his daughters to take the share of their mother at her death, and in the event of the death of any one of his daughters, without children, her share was to be divided equally among all the testator's children, sons as well as daughters. This interpretation of the clause in question, which is fortified by a number of decisions, takes the case out of the operation of the rule in *Shelley's case,* and assigns it to that class of cases of which the following may be said to be fairly illustrative: *Rollins v. Keel,* 115 N. C., 68, 20 S. E., 209; *Puckett v. Morgan,* 158 N. C., 344, 74 S. E., 15; *Jones v. Whichard,* 163 N. C., 241, 79 S. E., 503; *Pugh v. Allen,* 179 N. C., 307, 102 S. E., 394; *Blackledge v. Simmons,* 180 N. C., 535, 105 S. E., 202; *Wallace v. Wallace,* 181 N. C., 158, 106 S. E., 501; *Reid v. Neal,* 182 N. C., 192, 108 S. E., 769; *Hampton v. Griggs,* 184 N. C., 13, 113 S. E., 501; *Welch v. Gibson,* 193 N. C., 684, 138 S. E., 25.

The distinction between this line of cases, in which the rule has been held not to be applicable to the limitations appearing therein and the long line of decisions in which it has been held to be applicable and firmly established as the law of this jurisdiction, was first pointed out in *Pugh v. Allen, supra,* and repeated in *Hampton v. Griggs, supra,* and *Welch v. Gibson, supra,* substantially as follows: When there is an ulterior limitation which provides that upon the happening of a given contingency, the estate is to be taken out of the first line of descent and then put back into the same line, in a restricted manner, by giving it to some, but not to all, of those who presumptively would have shared in the estate as being potentially among the heirs general of the first taker, this circumstance may be used as one of the guides in ascertaining the paramount intention of the testator, and, with other indicia, it has been held sufficient to show that the words "heirs" or "heirs of the body" were not used in their technical sense.

As the trial court held the rule to be applicable to the limitations in the instant case, the judgment will be vacated and the cause remanded for further proceedings, not inconsistent herewith.

Error and remanded.

DAVID SAVAGE v. R. F. McGLAWHORN AND J. N. GORMAN.

(Filed 17 September, 1930.)

1. **Contracts F b—Where plaintiff's own breach of contract has caused failure of defendant to perform, plaintiff may not recover thereon.**

   A party to a contract may not recover damages of the other party thereto for its breach when his own breach has caused the failure of the other to perform his part thereof.

2. **Estoppel B a—Judgment in former action held to estop plaintiff in present action.**

   Where the plaintiff brings action for breach of a contract whereby the defendants, as partners, were to furnish land and the plaintiff to cultivate crops thereon, alleging that he was ejected therefrom during the cultivation of the crop, a judgment obtained by one of the defendants against the present plaintiff in an action in ejectment before a justice of the peace will operate to estop the plaintiff, the issues in the ejectment action being as to whether the present plaintiff had breached the same contract sued on by failing to cultivate the crops, and the fact that the action in ejectment was brought by only one of the present defendants does not destroy the identity of parties necessary to an estoppel, especially where the present plaintiff failed to demur in the ejectment action for defect of parties.

3. **Evidence J a — Parol evidence held admissible to show identity of issues in former action pleaded as estoppel.**

   Where the judgment relied on as an estoppel in a subsequent action is ambiguous as to the identity of a contract involved in both actions, parol evidence not inconsistent with the record of the former action is competent to identify the issue therein formerly adjudicated.

APPEAL by defendants from *Moore, Special Judge,* at April Term, 1930, of EDGECOMBE. New trial.

Action for breach of contract. The plaintiff alleges that in January, 1927, he made a contract with the defendants as partners in farming, under which the plaintiff was to prepare the soil and plant, cultivate, and house the crops, and the defendants were to furnish the land and one-half the fertilizer and were to advance to the plaintiff $25 a month—the crop to be divided between the parties; that on 29 July, 1927, the defendants unlawfully and wilfully broke their contract and forced the plaintiff to leave the premises; and that he has been damaged in the sum of five hundred dollars.

The defendants answered, setting up their statement of the specific terms of the contract and alleging that they brought summary proceedings in ejectment before a justice of the peace, in which judgment was rendered that the plaintiff be evicted from the premises for breach of the contract on which his complaint is founded.

The following verdict was returned:

1. Did the defendant breach the contract as alleged by the plaintiff in his complaint? Answer: Yes.

2. If so, in what sum is plaintiff entitled to recover of the defendant? Answer: $200.

Judgment for plaintiff; appeal by defendants.

George M. Fountain for plaintiff.
Henry C. Bourne for defendants.

ADAMS, J. This action is prosecuted by the plaintiff to recover damages for the defendants' alleged breach of a contract. The plaintiff can recover only by proof of the contract, his compliance with its terms, and the defendants' breach.

The defendants offered the judgment roll of a justice of the peace in an action entitled "R. F. McGlawhorn *v.* David Savage." Savage is the plaintiff in the present action and McGlawhorn is one of the defendants. In the action before the justice the plaintiff "complained for possession of the house occupied by the defendant, by reason of a forfeiture of the contract, the defendant refusing to work the crops." The parties appeared and offered evidence and "judgment was rendered that the plaintiff be put in possession of the house and recover the cost of the action."

This judgment was offered by the defendants as an estoppel against the plaintiff, but was admitted only in corroboration of the evidence of the defendants that the plaintiff had violated the contract. This ruling presents the vital exception.

If the contract on which the plaintiff bases this action is the contract he was adjudged by the justice of the peace to have violated he is estopped. He will not be permitted to recover damages for the breach of a contract with which he has refused to comply. So the question is whether the justice's judgment is evidence to be considered by the jury in determining the disagreement of the parties on this point. *Clothing Co. v. Hay,* 163 N. C., 495. One of the tests of estoppel by judgment is identity of issues. *Gillam v. Edmonson,* 154 N. C., 127. In the trial before the magistrate the existence of the contract and its breach by the defendant (plaintiff here) were matters in issue; in this action the existence of the contract and the compliance of the plaintiff (defendant in the other action) are matters in issue. The judgment in either action necessarily involves a contract or contracts and the breach.

It is suggested that the judgment roll does not specify the contract adjudged to have been forfeited; but the ground of the forfeiture was Savage's refusal to work the crop. If the judgment of the justice contains a latent ambiguity, parol evidence not inconsistent with the record is admissible to identify the point or issue therein adjudicated. *Yates v. Yates,* 81 N. C., 397; *Person v. Roberts,* 159 N. C., 168, 173; *Whitaker v. Garren,* 167 N. C., 658; *Cropsey v. Markham,* 171 N. C., 43.

It is insisted by the appellee that there is no mutuality of parties, the only plaintiff in the original action being one of the present defendants. Technically this is true; but the plaintiff's testimony admits of the construction that only one contract was executed and that the original action was brought by the party with whom it was made. The fact that Gorman was a partner with McGlawhorn, but was not a party to the original action should not be permitted to defeat the merits, especially when it appears that the plaintiff with knowledge of the partnership did not demur for a defect of parties.

New trial.

STATE v. ALVIN JOHNSON.

(Filed 17 September, 1930.)

1. **Intoxicating Liquor B b—Evidence of defendant's guilt of possession of intoxicating liquor held insufficient to go to the jury.**

Where in a prosecution for possession and transporting intoxicating liquor, the evidence tends only to show that the defendant went with one storing intoxicating liquor in the barn of another, whom he had never seen before, in order to show him the way at the latter's request; that the liquor was afterwards found there by prohibition officers, without further evidence to connect the defendant with the violation of the law of transporting intoxicating liquor and having it in his possession for the purpose of sale, it is not sufficient evidence of guilt to go to the jury, and the defendant's motion as of nonsuit, C. S., 4643, should have been granted.

2. Criminal Law G m—Sufficiency of evidence to go to the jury.

Evidence sufficient to take the case to the jury in a criminal action must tend to prove the fact in issue or reasonably conduce to its conclusion as a fair, logical and legitimate deduction, and not merely such as raises a suspicion or conjecture of guilt.

APPEAL by defendant, Alvin Johnson, from *Devin, J.*, at March Term, 1930, of VANCE.

Criminal prosecution tried upon a warrant charging the defendant with transporting intoxicating liquor and having the same in his possession for the purpose of sale, contrary to the statute, etc.

The evidence tends to show the following facts:

1. On the morning of 10 December, 1929, the defendant went to the home of Sam Jones and told him that he had some liquor which he would like to store with him for a few days. Jones had never seen the defendant before that morning.

2. In the afternoon of the same day, Oscar Tucker carried fifty-two gallons of liquor in a truck to the house of Sam Jones, and stored it in his feed barn.

3. Tom Coghill went with the defendant to Jones's house in the morning, and he also rode with Tucker, who hailed him on the street, to show him the way to Jones's house in the afternoon.

4. Oscar Tucker, a witness for the State, testified that he had no agreement or connection with the defendant concerning the liquor which was found by the officers in Jones's barn or any other liquor.

The defendant offered no evidence.

Demurrer to the State's evidence under C. S., 4643, overruled; exception.

Verdict: Guilty.

Judgment: Twelve months in jail with leave to hire out to work on public roads of Vance or any other county.

Defendant appeals, assigning error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

A. A. Bunn and J. M. Peace for defendant.

STACY, C. J. The evidence does no more than raise a suspicion, somewhat strong perhaps, of the defendant's guilt. It would require a repudiation of Tucker's testimony and a guess to bridge the hiatus in the State's case. Hence, under the principle announced in *S. v. Battle,* 198

N. C., 379, 151 S. E., 927; *S. v. Swinson,* 196 N. C., 100, 144 S. E., 555; *S. v. Montague,* 195 N. C., 20, 141 S. E., 285; *S. v. Prince,* 182 N. C., 788, 108 S. E., 330; *S. v. Rhodes,* 111 N. C., 647, 15 S. E., 1038; *S. v. Goodson,* 107 N. C., 798, 12 S. E., 329; *S. v. Brackville,* 106 N. C., 701, 11 S. E., 284; *S. v. Massey,* 86 N. C., 660, and *S. v. Vinson,* 63 N. C., 335, the motion for nonsuit will be allowed.

It is sometimes difficult to distinguish between evidence sufficient to carry a case to the jury, and a mere scintilla, which only raises a suspicion or possibility of the fact in issue. *S. v. Bridgers,* 172 N. C., 879, 89 S. E., 804; *S. v. White,* 89 N. C., 462. The general rule is that, if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury. But as was said in the case where a darky was being prosecuted for the larceny of a pig, there must be more than the argument of the solicitor: "Gentlemen of the jury, there was a hog. Here is a negro. Take the case." *Wilson v. Lumber Co.,* 194 N. C., 374, 139 S. E., 760; *Moore v. R. R.,* 173 N. C., 311, 92 S. E., 1.

Reversed.

J. T. SMITHWICK v. COLONIAL PINE COMPANY, INC.

(Filed 17 September, 1930.)

1. **Pleadings D a—Where pleadings liberally construed allege a cause of action a demurrer thereto will be overruled.**

Upon a demurrer the pleadings are liberally construed in the light most favorable to the pleader, and where there are conflicting allegations, and one of them is sufficient to allege a cause of action, a demurrer thereto will not be sustained. C. S., 535.

2. **Highways B h—In this case held: demurrer on ground that complaint disclosed contributory negligence barring recovery was properly overruled.**

Where, in an action to recover damages for a collision it is alleged that the collision resulted from the plaintiff's son, while driving in a careful manner, running into the defendant's truck which was negligently parked on the hard-surface portion of the highway, and that the injury was a result of the "wilful, wanton, careless and negligent conduct of the defendant," the allegations are sufficient to overrule defendant's demurrer thereto entered on the ground that the contributory negligence of the plaintiff's son was patent upon the face of the complaint. *Lee v. Produce Co.,* 197 N. C., 714, cited and applied. *Burgin v. R. R.,* 115 N. C., 673, cited and distinguished.

APPEAL by defendant from *Small, J.*, at February Term, 1930, of BERTIE.

Civil action to recover damages for an alleged negligent injury to plaintiff's automobile, caused by a collision between said automobile, while being driven in a careful manner by plaintiff's son, and the defendant's truck which was negligently parked on the hard-surfaced portion of the highway, heavily loaded with lumber. It is alleged that the injury to plaintiff's automobile, in the amount of $1,000, was caused by "the wilful, wanton, careless and negligent conduct of the defendant."

A demurrer was interposed on the alleged ground that the contributory negligence of plaintiff's son was patent on the face of the complaint. Overruled; exception; appeal.

J. H. Matthews for plaintiff.
S. L. Arrington for defendant.

STACY, C. J. The judgment will be affirmed on authority of what was said in *Lee v. Produce Co.*, 197 N. C., 714, 150 S. E., 363.

The case of *Burgin v. R. R.*, 115 N. C., 673, 20 S. E., 473, strongly relied upon by the defendant, is easily distinguishable, the character of the allegations in the two complaints being quite different.

Affirmed.

J. VERNON SMITHWICK v. COLONIAL PINE COMPANY, INC.

(Filed 17 September, 1930.)

APPEAL by defendant from *Small, J.*, at February Term, 1930, of BERTIE.

Civil action to recover damages for an alleged negligent injury caused by a collision between the automobile in which plaintiff was riding and the defendant's truck, which was negligently parked on the highway.

From a judgment overruling a demurrer, the defendant appeals, assigning error.

J. H. Matthews for plaintiff.
S. L. Arrington for defendant.

PER CURIAM. This is a companion case to *Smithwick v. Colonial Pine Company, ante,* 431, the two arising out of the same collision, and are controlled by the same principles of law.

Affirmed.

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY ET AL. v. ALLEN J. MAXWELL, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 17 September, 1930.)

1. **Taxation B c—Tax on privilege of operating chain stores is a license and not an ad valorem tax.**

Section 162 of chapter 345 of the Public Laws of 1929, imposing a tax on those operating branch or chain stores of fifty dollars for each store where there is more than one store under the same supervision, management or ownership, is a license tax for the privilege of operating chain stores imposed for the purpose of raising revenue, and it is not an *ad valorem* tax, nor does it seek to regulate chain stores under the police power, and the tax is in accord with the fiscal policy of the State of raising revenue for State purposes by the imposition of taxes on trades, professions, franchises and incomes, and leaving to the counties and municipalities for their support *ad valorem* taxes on real and personal property.

2. **Taxation A c—Legislature may classify trades, professions, franchises and incomes for taxation where classification is not arbitrary.**

While the provisions of Article V, section 3, of the Constitution of North Carolina requiring taxes on property to be levied by a uniform rule does not expressly apply to taxes on trades, professions, franchises and incomes, it does apply to such taxes from its inherent justice, but the General Assembly has the power to classify trades, professions, franchises and incomes for taxation where the classifications are reasonable and not arbitrary and are based upon substantial differences between the classes and apply equally to all within the classification.

3. **Same—Classification of chain stores for taxation by act of 1929 is reasonable and not arbitrary, and is constitutional.**

Section 162 of chapter 345 of the Public Laws of 1929, imposing a license tax on those operating chain stores of fifty dollars for each store operated under the same ownership or management where there is more than one store so operated, is a reasonable classification based upon a substantial difference, and applies equally to all within the class, and the statute is constitutional and valid, Article V, section 3, the difference between the act of 1929 and that of 1927 which imposed such a tax where there were more than five stores operated under the same management or ownership, creating a discrimination in favor of those operating chains of less than six stores, pointed out by CONNOR, J.

4. **Same—Classification of chain stores for taxation by act of 1929 does not violate provisions of Fourteenth Amendment to Federal Constitution.**

The provisions of the Fourteenth Amendment to the Federal Constitution providing that no State "shall deprive any person of life, liberty or property without due process of law" or "deny to any person within its jurisdiction the equal protection of the law" does not prohibit a state from classifying trades, professions, franchises and incomes from taxation where the classification is reasonable and not arbitrary, and is based upon a substantial difference between the classes, and applies equally to all within a class, the principles upon which the prohibitions of the Fourteenth Amendment are founded being similar to, if not identical with, our constitutional requirement that taxes for revenue on trades, etc., be by uniform rule.

APPEAL by plaintiffs from *Nunn, J.,* at November Term, 1929, of WAKE. Affirmed.

The above-entitled action was begun in the Superior Court of Wake County, on 29 August, 1929, to recover sums of money paid by the plaintiffs to the defendant, Commissioner of Revenue of North Carolina, as license taxes for the privilege of engaging in business in this State as branch or chain store operators, for the twelve months beginning on 1 June, 1929, and ending on 31 May, 1930. The taxes were levied and collected by defendant from each of the plaintiffs under and by virtue of the provisions of section 162 of chapter 345, Public Laws of North Carolina, session 1929. In accordance with the provisions of the statute, a State license was issued to each of the plaintiffs, under which said plaintiff has engaged in the business in this State authorized thereby.

Chapter 345, Public Laws of North Carolina, session 1929, is entitled "An Act to Raise Revenue." The said act contains a section, which is in the following words:

"Section 443. State Taxes. No *ad valorem* tax on any property in this State shall be levied for any of the uses of the State government. The taxes levied in this act are for the expenses of the State government, the appropriations to its educational, charitable and penal institutions, pensions for Confederate soldiers and widows, the interest on the debt of the State, an equalizing fund for public schools, and other specific appropriations made by law, and shall be collected and paid into the general fund of the State Treasurer."

Section 162 of said act is included in Schedule B, which is Article II of said act, entitled "License Taxes." It is provided in said article that "taxes in this article or schedule shall be imposed as a State license tax for the privilege of carrying on the business, exercising the privilege, or doing the act named." The said section is in words as follows:

"Section 162. Branch or Chain Stores. Every person, firm, or corporation engaged in the business of operating or maintaining in this State, under the same general management, supervision or ownership, two or more stores or mercantile establishments, where goods, wares, and/or merchandise is sold or offered for sale at retail shall be deemed a branch or chain store operator, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business of a branch or chain store operator, and shall pay for such license fifty dollars ($50.00) on each and every store operated in this State in excess of one."

Each of the plaintiffs, whether a person, a firm or a corporation, is a branch or chain store operator as defined in said section, and as such, at the time payment of the tax was demanded by the defendant, was, by the terms of said section, liable for the sum demanded as a license tax for the privilege of carrying on said business in this State. Payment of the sum demanded was made by each of the plaintiffs, under protest in writing, on the ground that the statute, under the provisions of which the tax was demanded, is void for that it was enacted in violation of both section 3 of Article V of the Constitution of North Carolina, and section 1 of the Fourteenth Amendment to the Constitution of the United States.

This action was thereafter begun to recover of the defendant the sums paid by the plaintiffs, respectively, under the provisions of section 464, chapter 345, Public Laws of North Carolina, session 1929. It was agreed by and between plaintiffs and defendant, that plaintiffs might join in one action, instead of bringing numerous separate actions, and that defendant would waive compliance by plaintiffs with certain provisions of said section, with respect to demand for the refund of said sums, prior to the commencement of this action.

When the action was called for trial, it was stipulated and agreed by and between the parties that all issues of fact arising on the pleadings should be determined by the court, without the intervention of a jury. The court thereupon heard the evidence offered by the plaintiffs, and, defendant having offered no evidence, from this evidence found the facts set out in the judgment. Upon these facts, the court was of opinion, and so found, "The classification of plaintiffs' business for the purpose of the license, business or occupation tax imposed by section 162 of chapter 345, Public Laws of North Carolina, session 1929, is neither arbitrary nor unreasonable, is not a violation of the State or Federal Constitution, but said license, privilege or occupation tax is imposed by uniform rule, does not deprive plaintiffs of their property without due process of law or deny them the equal protection of the law."

It was, thereupon, considered, ordered and adjudged that section 162 of chapter 345, Public Laws of North Carolina, session 1929, is not void, but is valid and constitutional; that plaintiffs take nothing by this action, and that defendant go hence without day, and recover his costs to be taxed by the clerk of the court.

From this judgment plaintiffs appealed to the Supreme Court.

Sullivan & Cromwell and Tillett, Tillett & Kennedy for The Great A. & P. Company.

Pender, Way & Foreman and McLean & Stacy for David Pender Grocery Company.

Perry & Kittrell for Rose's Five, Ten and Twenty-five Cents Stores.

Davies, Auerbach & Cornell and Pou & Pou for F. W. Woolworth Company.

Gwinn & Pell and Pou & Pou for J. C. Penney Company.

Douglass, Armitage & McCann and Pou & Pou for G. R. Kinney Company, Inc.

Gwinn & Pell and Pou & Pou for W. T. Grant Company.

Pou & Pou for Carolinas Stores, Inc.

Murray Allen for Milner Stores Company.

A. S. Jayne and Pou & Pou for Montgomery Ward & Company.

Tillett, Tillett & Kennedy for Merit Shoe Company.

Moses & Singer and Tillett, Tillett & Kennedy for National Bellas Hess Company.

Peacock & Dalton for McLellan Stores Company.

Robert H. Sykes for M. Samuels & Company, Inc.

Smith & Joyner for L. B. Price Mercantile Company.

Smith & Joyner for The Acorn Stores, Inc.

Lederer, Livingston, Kahn & Adler and Pou & Pou for Sears-Roebuck & Company.

Pou & Pou and Tillett, Tillett & Kennedy for A. C. Fite.

Gwinn & Pell and Pou & Pou for Melville Shoe Corporation.

Attorney-General Brummitt and Assistant Attorneys-General Nash and Siler for defendant.

Connor, J. The principal question presented by this appeal, as stated in the brief filed for plaintiffs in this Court, is, whether section 162 of chapter 345, Public Laws of North Carolina, session 1929, was enacted by the General Assembly of this State in violation of provisions of the Constitution of North Carolina, or of the Constitution of the United States, as contended by plaintiffs. If there was error in the opinion of the court below that the section is valid and constitutional, the judgment in accordance with said opinion must be reversed; otherwise, the judgment must be affirmed. The questions presented by plaintiffs' assignments of error based on their exceptions with reference to the findings of fact by the court, are not determinative of the appeal, and in the view which we take of the principal question presented for decision, need not be discussed or decided. It is admitted in the answer filed by the defendant that the section of the statute involved in this action was enacted by the General Assembly solely for the purpose of raising revenue for the use of the State. An examination of chapter 345, Public Laws of North Carolina, session 1929, which includes this section, shows clearly and unmistakably, we think, that defendant properly admitted the allegation of the complaint that "said statute is a revenue act, pure and simple. It was not intended to promote morality, health, or public order." There is nothing on the face of the statute, or in the findings of fact made by the court and pertinent to a decision of the question involved in this action, which shows or tends to show that the statute, or any section thereof, was enacted by the General Assembly in the exercise of the police power inherent in the government of this State. Nor is there anything in the record from which a purpose can be inferred on the part of the General Assembly, by the enactment of section 162 of chapter 345, Public Laws of 1929, to subject operators of branch or chain stores in this State to the police power. It is therefore immaterial for the purpose of deciding the question presented by this appeal whether chain stores are beneficial to the public or not. The question is whether operators of such stores may be lawfully taxed for the privilege of engaging in business in this State, as provided in section 162 of chapter 345, Public Laws 1929.

The policy of the State of North Carolina with respect to raising revenue for State purposes is well settled. It is provided in section 3 of Article V of the Constitution of this State that "laws shall be passed taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also, all real and personal property according to its true value in money." It is further provided in said section that "the General Assembly may also tax trades, professions, franchises, and incomes." The rate of the tax on incomes is limited in said section to 6 per cent, and certain exemptions with respect to said tax are expressly allowed. It is provided in section 6 of said article that "the total rate of the State and county tax on property shall not exceed fifteen cents on the one hundred dollars value of property except when the county property tax is levied for a special purpose, and with the special approval of the General Assembly, which may be done by special or general act: *Provided,* this limitation shall not apply to taxes levied for the maintenance of public schools for the term required by Article nine, section three, of the Constitution; *Provided further,* the State tax shall not exceed five cents on the one hundred dollars value of property." It is clear that when the Constitution of the State was amended in 1920, by striking out section 6, as it was prior to said amendment and substituting therefor the present section 6, limiting the rate of taxation on property for State purposes other than the maintenance of the public schools to five cents on the one hundred dollars valuation, it was contemplated that the General Assembly would adopt the policy, which it has since pursued, of raising revenue required for State purposes by taxing trades, professions, franchises, and incomes, leaving to the counties and municipalities of the State, for their support, the tax on property, real and personal. Section 443 of chapter 345, Public Laws of 1929, was enacted pursuant to this policy. It is provided therein that "no *ad valorem* tax on any property in the State shall be levied for any of the uses of the State." The taxes levied for State purposes by chapter 345, Public Laws of 1929, are (1) Taxes on Inheritances; (2) License Taxes on trades, professions and occupations; (3) Taxes on Franchises; and (4) Taxes on Incomes. License taxes are imposed on persons, firms and corporations engaged in certain businesses or occupations in this State, and are levied for the privilege of carrying on the business, exercising the privilege, or doing the act named. Section 100. Persons, firms or corporations subject to the license taxes imposed by said statute in Schedule B, are classified for the purpose of such taxation, the amount of the tax being in most instances graduated in accordance with such classification. Provision is made by the statute for the assessment and collection of all the license taxes imposed thereby, all of which are payable to the State Treasurer, to be held by him for the payment of appropriations made by the General Assembly for State purposes.

The tax demanded of each of the plaintiffs by the defendant, Commissioner of Revenue, as required by law, and paid by said plaintiff, under protest, is a tax on the privilege of engaging in business in this State as a branch or chain store operator, as defined by the statute. This tax was valid, and plaintiffs having paid the same, are not entitled to recover in this action, unless, as they contend, the statute under which it was levied and collected is void, for that said statute contravenes some provisions of the Constitution of North Carolina, or of the United States.

Plaintiffs contend that the enactment by the General Assembly of this statute violated the rule of uniformity prescribed by the Constitution of North Carolina, for taxation. Const. of N. C., Art. V, sec. 3.

It has been held by this Court that while the rule of uniformity prescribed by the Constitution of this State for taxation, applies expressly only to taxes on property, the rule is so inherently just that taxes on trades, professions, franchises and incomes, although not subject to the rule, expressly, must be imposed, levied, and assessed in accordance therewith, to the end that there shall be no unjust or arbitrary discrimination in this State with respect to such taxes. The principle of "equal rights to all, and special privileges to none," is fundamental, and must be recognized as such in the levy, assessment and collection of all taxes in this State. A tax levied by the General Assembly on trades, professions, franchises or incomes in violation of the rule of uniformity, and resulting in unjust or arbitrary discriminations, would be so inconsistent with natural justice, that its collection would be restrained as unconstitutional, or, if paid, would be ordered refunded to the taxpayer, for the reason that he would thereby be deprived of the equal protection of the law. Thus in *S. v. Williams,* 158 N. C., 610, 73 S. E., 1000, *Walker, J.,* says that this Court has held that the rule of uniformity applies to the taxes which the General Assembly is expressly empowered by the Constitution to levy upon trades, professions, franchises or incomes, although there are no express words to that effect in the Constitution. He cites *Gatlin v. Tarboro,* 78 N. C., 119, and *Worth v. R. R.,* 89 N. C., 291. This principle has been recognized by the General Assembly of this State, in imposing these taxes. *Tea Company v. Doughton,* 196 N. C., 145, 144 S. E., 701. Instances in which this Court has held that there had been a violation of this principle are few; in such cases, the application of the principle, rather than the principle itself, has been brought in question. In no case has there been an apparent purpose on the part of the General Assembly to violate the rule of uniformity. In each case, the statute imposing the tax has been held void by this Court, because its effect, and not its purpose, was to violate the rule, and thus to result in an unjust and arbitrary discrimination.

It has also been held by this Court in accordance with well-settled principles, that classification of subjects of such taxation, when reasonably and not arbitrarily made, is not a violation of the rule of uniformity, resulting in unjust and arbitrary discrimination. Thus in *S. v. Stevenson,* 109 N. C., 730, 14 S. E., 385, *Clark, J.,* says: "The power to select particular trades or occupations and subject them to a license tax cannot be denied to the Legislature—nor the power to tax such trades according to different rules, provided the rule in regard to each business is uniform. . . . Indeed, there can be, strictly speaking, no uniform, proportional and *ad valorem* tax on all trades, professions, franchises and incomes, taken together, because they are so dissimilar that there is no practical means of arriving at what should be a uniform tax common to them all. . . . It is within the legislative power to define the different classes, and to fix the license tax required of each class. All the licensee can demand is that he shall not be taxed at a different rate from others in the same occupation as 'classified' by legislative enactment." Again in *Land Co. v. Smith,* 151 N. C., 70, 65 S. E., 641, *Hoke, J.,* says: "The power of the Legislature in this matter of classification is very broad and comprehensive, subject only to the limitation that it must appear to have been made upon some 'reasonable ground—something that bears a just and proper relation to the attempted classification, and not a mere arbitrary selection'—and under numerous and well-considered, and authoritative decisions the classification made in this instance must be upheld and approved. *Lacy v. Packing Co.,* 134 N. C., 567, 47 S. E., 53; *S. v. Stevenson,* 109 N. C., 730, 14 S. E., 385; *S. v. Powell,* 100 N. C., 525, 6 S. E., 424; *Gatlin v. Tarboro,* 78 N. C., 119; *State R. R. Tax Cases,* 92 U. S., 575." A classification made for purposes of taxation, therefore, in order to avoid condemnation for that it violates the rule of uniformity, must not be arbitrary, unreasonable or unjust. It must not result in unjust, unreasonable or arbitrary discrimination. There must be some real and substantial difference to justify the classification, when made for the purpose of imposing a license tax on all who fall within one class, without imposing a like tax on all who fall within another class. *Tea Company v. Doughton, supra.*

When the classification is founded on some real and substantial difference, and is therefore reasonable and not arbitrary, a different rule for the taxation of subjects falling within the respective classes, may be adopted by the General Assembly. It is sufficient that the tax imposed shall be uniform as to all persons, firms or corporations falling within the same class. *S. v. Williams,* 158 N. C., 610, 73 S. E., 1000. Thus in *S. v. Danenberg,* 151 N. C., 718, 66 S. E., 301, *Brown, J.,* says: "It appears to be well settled that unless the power to tax is transcended, the reasonableness, or unreasonableness of a tax levied exclusively for revenue, is a matter generally within the exclusive province of the legislative department of the State, and is not a matter for the courts; but when the license tax is demanded also as a police regulation, the courts will consider whether it is so unreasonable as to amount to a prohibition upon lawful vocations which cannot be prohibited. Tiedeman on Police Powers, p. 277; *S. v. Hunt,* 129 N. C., 688, 40 S. E., 216; *Winston v. Beeson,* 135 N. C., 277, 47 S. E., 457." When a classification has been made by the General Assembly, for the purpose of imposing license taxes on trades, professions, franchises or incomes, solely for the purpose of raising revenue, this Court will not hold the classification invalid, unless it shall appear, clearly and unmistakably, that the classification is unreasonable and arbitrary, resulting in an unjust discrimination. Unless it shall so appear, the classification will be upheld and the tax imposed adjudged valid, notwithstanding the contention that its imposition violated the rule of uniformity.

Plaintiffs contend that the enactment by the General Assembly of this State of section 162 of chapter 345, Public Laws of North Carolina, session 1929, violated section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall "deprive any person of life, liberty or property without due process of law"; or "deny to any person within its jurisdiction the equal protection of the laws."

The principle, upon which these prohibitions upon action by a State are founded, when applied to laws enacted by the Legislature of a State, for the purpose of raising revenue, is similar to, if not identical with, that upon which the General Assembly of this State is forbidden to impose taxes on trades, professions, franchises or incomes, as well as upon property, in violation of the rule of uniformity, as properly interpreted and applied. It is subject to the same limitations as those which have been imposed by the law of this State upon the General Assembly with respect to the enactment of laws levying taxes. It does not forbid classification of the subjects of taxation by the General Assembly, provided there is some real and substantial basis for the classification. Thus, in *Ohio Oil Co. v. Conway,* 50 S. C., 310, 74 L. Ed., 456, decided on 14 April, 1930, *Mr. Chief Justice Hughes* says:

"The applicable principles are familiar. The states have a wide discretion in the imposition of taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests. The states, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses of the Fourteenth Amendment, but that amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. The State may tax real and personal property in a different manner. It may grant exemptions. The State is not limited to *ad valorem* taxation. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. In levying such taxes, the State is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure. *Bell's Gap R. Co. v. Pennsylvania,* 134 U. S., 232, 237, 33 L. Ed., 892, 895, 10 Sup. Ct. Rep., 533; *Magoun v. Illinois Trust & Sav. Bank,* 170 U. S., 283, 293, 42 L. Ed., 1037, 1042, 18 Sup. Ct. Rep., 594; *Southwestern Oil Co. v. Texas,* 217 U. S., 114, 121, 54 L. Ed., 688, 692, 30 Sup. Ct. Rep., 496; *Brown-Forman Co. v. Kentucky,* 217 U. S., 563, 573, 54 L. Ed., 883, 887, 30 Sup. Ct. Rep., 578; *Sunday Lake Iron Co. v. Wakefield Twp.,* 247 U. S., 350, 353, 62 L. Ed., 1154, 1156, 38 Sup. Ct. Rep., 495; *Heisler v. Thomas Colliery Co.,* 260 U. S., 245, 67 L. Ed., 237, 43 Sup. Ct. Rep., 83; *Oliver Iron Min. Co. v. Lord,* 262 U. S., 172, 179, 67 L. Ed., 929, 936, 43 Sup. Ct. Rep., 526; *Stebbins v. Riley,* 268 U. S., 137, 142, 69 L. Ed., 884, 44 A. L. R., 1454, 45 Sup. Ct. Rep., 424.

"With all this freedom of action, there is a point beyond which the State cannot go without violating the equal protection clause. The State may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The State is not at liberty to resort to a classification that is palpably arbitrary. The rule is generally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *F. S. Royster Guano Co. v. Virginia,* 253 U. S., 412, 415, 64 L. Ed., 989, 990, 40 Sup. Ct. Rep., 560; *Louisville Gas & E. Co. v. Coleman,* 277 U. S., 32, 37, 72 L. Ed., 770, 773, 48 Sup. Ct. Rep., 423; *Air-Way Electric Appliance Corp. v. Day,* 266 U. S., 71, 85, 69 L. Ed., 169, 177, 45 Sup. Ct. Rep., 12; *Schlesinger v. Wisconsin,* 270 U. S., 230, 240, 70 L. Ed., 557, 564, 43 A. L. R., 1224, 46 Sup. Ct. Rep., 260."

The purpose of the provisions of section 1 of the Fourteenth Amendment relied upon by plaintiffs in this action, is to prohibit the States from unjustly discriminating against persons subject to their jurisdiction, and from thereby depriving them of life, liberty or property, without due process of law, or of the equal protection of law. For this reason, classification made by a State, for purposes of taxation, or of regulation, under the police power, are not prohibited, when made upon just and reasonable grounds, and founded on real and substantial differences. Laws which do not result in unreasonable and arbitrary discrimination are not in violation of section 1 of the Fourteenth Amendment.

In view of the foregoing well-settled principles of constitutional law, both State and Federal, applicable to the question presented for decision by this appeal, we are of opinion that there was no error in the finding and conclusion of the court below that the classification made by the General Assembly of this State, in section 162 of chapter 345, Public Laws of North Carolina, session 1929, of the business of maintaining and operating branch or chain stores, as therein defined, exclusively for purposes of taxation, is neither unreasonable nor arbitrary; that there is a real and substantial difference between merchants who exercise the privilege of carrying on their business in this State, by means of two or more stores, and those who maintain and operate only one store, and that this difference appears on the face of the statute, without regard to the findings of fact made by the court; that the imposition of a license tax on one class, without the imposition of a like tax on the other class of merchants, is not an unjust, unreasonable or arbitrary discrimination between the two classes, for the reason that merchants who are required to obtain licenses, and to pay the tax, have and exercise a more valuable privilege than those who are required to do neither; that therefore, the statute is not in violation of either the State or the Federal Constitution.

The statute was enacted by the General Assembly in the exercise of a wide and comprehensive discretion vested in it as the legislative department of the State government, and is in pursuance of the well-settled policy of the State with respect to its system of taxation. The classification in accordance with which the plaintiffs were required to pay the license taxes imposed by the statute, is neither capricious nor arbitrary. *Brown-Forman Co. v. Kentucky,* 217 U. S., 54, L. Ed., 883. The tax is not unreasonable or discriminatory. *Ohio Oil Co. v. Conway, supra.* The judgment must, therefore, be affirmed.

A comparison of the statute involved in this action with that which we held void and unconstitutional in *Tea Co. v. Doughton,* 196 N. C., 145, 144 S. E., 701, will disclose, we think, a vital and essential distinction between the two statutes. The tax imposed by section 162 of chapter 80, Public Laws 1927, was not levied on chain store operators, *per se,* as is the case in section 162 of chapter 345, Public Laws 1929. In the former statute, the license was required, and the tax imposed upon every person, firm or corporation engaged in the business of maintaining and operating six or more stores, with an exemption from any tax of those who maintained and operated five or less stores. In the latter statute there is no exemption, and no "retroactive tax." The tax is so imposed that merchants who are classified as branch or chain store operators, are on an equality with respect to one store, with merchants who are not branch or chain store operators. Here is no discrimination, which as *Clarkson, J.,* says, in his concurring opinion in *Tea Company v. Doughton, supra,* is the vice in the former statute. In the latter statute the classification is made and the tax imposed in accordance with the value of the privilege obtained by the license. *Clark v. Maxwell,* 197 N. C., 604, 150 S. E., 190. Both the classification and the tax are valid, and plaintiffs are not entitled to recover the sums paid by them, respectively, to the defendant. The judgment is

Affirmed.

SUE I. NELSON, ADMINISTRATRIX OF THE ESTATE OF MEYNARDIE NELSON, DECEASED, v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 17 September, 1930.)

1. **Insurance J c—Failure to give immediate notice of disability will not work forfeiture where insured is incapable of giving such notice.**

Where a policy of life insurance contains a clause waiving the payment of premiums and providing for the payment to the insured of a certain amount of money monthly upon receipt from the insured and acceptance by the company of due proof that the insured has become totally and permanently disabled: *Held*, where the insured has become mentally incapable of furnishing such proof or having it furnished for him, and is without fault, his failure to give immediate written notice will not work a forfeiture, and where such proof is furnished more than a year after the beginning of the disability by the insured's son upon his discovery of the policy, the insurer is liable for the amount of the monthly disability payments from the time of the disability to the death of the insured and for a premium paid on the policy after the beginning of such disability; and *held further*, evidence of the insured's incapacity to give such notice was sufficient to go to the jury in this case.

2. **Trial D a—Upon motion as of nonsuit all evidence is to be taken in the light most favorable to the plaintiff.**

Upon a motion as of nonsuit, the evidence which makes for the plaintiff's claim and which tends to support his cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, is to be taken and considered in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable intendment thereof and every reasonable inference to be drawn therefrom.

3. **Evidence K c—Nonexpert witnesses may testify as to physical and mental incapacity of one whom they have had opportunity to observe.**

Where in an action on a life insurance policy the capacity of the deceased insured to have given notice of disability is in issue, it is competent for those having had knowledge of and an opportunity to observe the deceased to testify that his mental and physical condition was such that he had been wholly incapacitated from giving such notice, both as relevant and material to the inquiry and as a "shorthand statement of a collective fact."

4. **Trial E e—In this case held: refusal of trial court to give instructions requested was immaterial.**

Where the verdict of the jury makes the refusal of the trial court to give special instructions requested immaterial, and the charge to the jury taken as a whole is correct and covers all material aspects of the law presented by the evidence, and the issues submitted were proper and determinative of the controversy, the refusal to give the requested instructions will not be held for error.

APPEAL by defendant from *Small, J.*, and a jury, at September Term, 1929, of WARREN. No error.

This is an action brought by plaintiff, administratrix, against the defendant, to recover on a policy issued by defendant to her intestate. The policy, No. 175188, was issued on 15 November, 1922. The annual premium on the policy, in advance, was $1,090.75. The life of plaintiff's intestate was insured for $25,000, and the policy contract contained the following—the basis of this action: "Rider attached to and forming part of Policy No. 175188, issued to Meynardie Nelson, total and permanent disability. If, after one full annual premium shall have been paid on this policy and before default in the payment of any subsequent premium, the insured shall furnish to the company due proof of entire and irrevocable loss of the sight of both eyes, . . . or that he has been wholly and continuously disabled by bodily injuries or disease other than mental and will be permanently, continually and wholly prevented thereby from pursuing any occupation whatsoever for remuneration or profit, provided that such total and permanent disability shall occur before the anniversary of the policy on which his age at the nearest birthday is 60 years, the company, by endorsement in writing on this contract will agree to pay (a) The premiums which shall become payable after the accrual and proof of said disability and during the continuance thereof, and (b) commencing immediately from the acceptance by the company of the original proofs of disability provided the insured is still disabled, a monthly income during the lifetime of the insured prior to the maturity of this policy as an endowment or death claim, of one per cent of the face amount of this policy, the amount otherwise payable at the maturity of this policy shall not be reduced by any premiums or installments paid under the above provisions. If disability is total, but not obviously permanent, it shall be presumed to be permanent after continuous total disability for three months, and the waiver and installments shall accrue from the beginning of the fourth month of such continuous total disability. Upon receipt of due proof that the insured has, for more than 60 days immediately prior to the filing of such proofs, been continuously and wholly disabled through loss of reason or through any mental disease and presumably will be permanently, continuously and wholly prevented thereby from pursuing any occupation whatsoever for remuneration or profit, after one full annual premium shall have been paid and before a default in the payment of any subsequent premium, provided that such total and permanent disability shall occur before the anniversary of the policy on which his age at nearest birthday is 60 years, the company will, by endorsement in writing on this contract grant to the insured the benefits of paragraph (a) above, but he shall not be entitled to the benefits of paragraph (b)."

The premiums have been paid by the insured in accordance with the terms of the policy. Plaintiff's intestate died 27 February, 1929. The beneficiary of the $25,000 policy was the plaintiff, who has been paid that sum by defendant. The disability benefits were paid from 17 October, 1928, until the death of plaintiff's intestate, to Sue I. Nelson, guardian of Meynardie Nelson.

It is admitted that if any total and permanent disability occurred, it occurred before the anniversary of the policy on which insured's age at nearest birthday was 60 years, and after the payment of one full annual premium on the policy and before default of any subsequent premiums on said policy sued on.

The issues submitted to the jury and their answers thereto were as follows:

"1. Did Meynardic Nelson, the insured, become wholly and continuously disabled by disease, other than mental, and was he permanently, continuously and wholly prevented thereby from pursuing any occupation whatsoever for remuneration or profit, as alleged in the complaint? Answer: Yes.

2. If so, from what date? Answer: 1 April, 1927.

3. If he became so disabled prior to 17 October, 1928, was he continuously so insane that he was incapable of, and unable to furnish proof of such disability, as required by the terms of the policy, or to procure some one to do it for him? Answer: Yes.

4. If so, from what date? Answer: 1 April, 1927.

5. What amount, if any, is the plaintiff entitled to recover of the defendant on account of premium paid after the total disability of the insured? Answer: $1,090.75, with interest.

6. What amount, if any, is the plaintiff entitled to recover of defendant on account of monthly benefits under said policy? Answer: $4,641.66⅔."

The court below rendered judgment on the verdict.

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The necessary facts will be set forth in the opinion.

Travis & Travis, Joseph P. Pippen and J. M. Picot for plaintiff.

Geo. C. Green and Brooks, Parker, Smith & Wharton for defendant.

CLARKSON, J. The defendant, at the close of plaintiff's evidence and at the close of all the evidence, made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled the motions and in this we can see no error.

In *Rhyne v. Insurance Co.*, 196 N. C., 717, *Stacy, C. J.*, speaking for a unanimous Court, citing numerous authorities, said, at p. 718: "It is considered by a majority of the courts that a stipulation in a contract of insurance requiring the assured, after suffering injury or illness, to perform some act, such as furnishing to the company proof of the injury or disability within a specified time, ordinarily does not include cases where strict performance is prevented by total incapacity of the assured to act in the matter, resulting from no fault of his own, and that performance within a reasonable time, either by the assured after regaining his senses or by his representative after discovering the policy, will suffice. . . . (p. 719). But we are content to place our decision on the broad ground that, notwithstanding the liberal meaning of the words used, unless clearly negatived, a stipulation in an insurance policy requiring notice, should be read with an exception reasonably saving the rights of the assured from forfeiture when, due to no fault of his own, he is totally incapacitated from acting in the matter. That which cannot fairly be said to have been in the minds of the parties, at the time of the making of the contract, should be held as excluded from its terms." A petition to rehear the Rhyne action was denied 31 May, 1929. See *Rhyne v. Jefferson Standard Life Ins. Co., ante,* 419.

In Vol. 2, C. S., under Insurance, subchap. 5, accident and health insurance, C. S., 6479, dealing with standard provisions in policy under subsec. 5, is the following: *"Failure to give notice within the time provided in this policy shall not invalidate any claim, if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible."* (Italics ours.)

It will be noted that under the standard provisions in policies, where time limit is fixed, yet the General Assembly realizing that a hard and fast rule should not always be applied, put in the above provision to meet varying contingencies that might arise. Although the above provision was not cited to this Court, in the case of *Mewborn v. Assurance Corporation,* 198 N. C., at p. 158, yet this Court held: "The expression 'immediate written notice,' as used in the policy, we apprehend, was intended to impose upon the plaintiff the exercise of reasonable diligence in giving the required notice, which, under the apparent weight of authority, should be measured by his ability and opportunity to act in the premises. *Carey v. Farmers, etc., Ins. Co.,* 27 Ore., 146, 40 Pac., 91; *Rhyne v. Ins. Co.,* 196 N. C., 717, 147 S. E., 6." Under C. S., 6479, *supra,* latter part subsec. 4, we find: "If Form (A) or Form (C) is used the insurer may at its option add thereto the following sentence: 'In event of accidental death immediate notice thereof must be given to the insurer.' "

The defendant contends that under the policy contract sued on filing of proofs of disability was a condition precedent to the attaching of liability. We cannot so hold. The *Rhyne case, supra,* was thoroughly considered by this Court, and we see no reason to change our opinion. There is no question made, and it is admitted that plaintiff's intestate paid all the premiums demanded by defendant for disability benefits to plaintiff's intestate when "wholly and continuously disabled by bodily injuries or disease other than mental and will be permanently, continuously and wholly prevented thereby from pursuing any occupation whatsoever for remuneration or profit," etc.

Plaintiff's intestate under the provisions of the policy was clearly entitled to be paid from the time he was "wholly and continuously disabled," etc., but defendant contends that the policy contract, although the premiums have been paid, for the disability, as found by the jury, occurred 1 April, 1927, that there is a condition precedent that makes the filing of proofs necessary before liability attaches. The defendant was paid for the disability benefits and there was disability commencing 1 April, 1927, and continued. The defendant's contention, under the facts of this case, is too technical. If we should so hold, the policy contract would be as it were a body without a heart.

With the law settled in this jurisdiction, as above stated, what was the evidence? The battle waged in the court below was over these issues. We set them forth with the answers by the jury: "(1) Did Meynardie Nelson, the insured, become wholly and continuously disabled by disease, other than mental, and was he permanently, continuously and wholly prevented thereby from pursuing any occupation whatsoever for remuneration or profit, as alleged in the complaint? Answer: Yes. (2) If so, from what date? Answer: 1 April, 1927. (3) If he became so disabled prior to 17 October, 1928, was he continuously so insane that he was incapable of, and unable to furnish proof of such disability, as required by the terms of the policy, or to procure some one to do it for him? Answer: Yes. (4) If so, from what date? Answer: 1 April, 1927."

It is the settled rule of practice in this jurisdiction that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support his cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, is to be taken and considered in its most favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom.

The evidence in the present action tended to show: That the family of plaintiff's intestate was unaware of the provisions of the policy until plaintiff's intestate's son and brother-in-law, who had charge of plaintiff's intestate's business, the Nelson Vertical Paper Cutter Co., had to pay a premium on the policy and went to the lock box and got the policy and found it was a disability benefit policy. In answer to a telegram sent defendant's assistant manager, the defendant answered as follows: "Greensboro, N. C. W. A. Johnson, Nelson Vertical Paper Cutter Co., Littleton, N. C. We were advised last week by our Raleigh office that Mr. Nelson was incapable of managing his affairs, and requested them to advise family to have a guardian appointed, as disability benefits cannot be paid except to guardian. We have been holding file awaiting guardianship papers. Letter follows. Jefferson Standard Life Insurance Co."

Plaintiff was appointed guardian, and total and permanent disability information was submitted to defendant on 17 October, 1928. From that date until plaintiff's intestate died the disability benefits were paid by defendant to plaintiff as guardian. This action is for the disability benefits prior. In the information furnished defendant, on 17 October, 1928, we find: "(7) Give names and addresses of attending physicians: Dr. L. H. Justis, Littleton, N. C. (8) State fully all symptoms in your condition from its beginning to the present time—weakness, eruptions on hands and feet. (9) On what date were you forced to give up your occupation or work? Feby., 1927. (10) Are you now confined to your bed? Yes. Home? Yes. If so, how long have you been so confined? Practically entire time since Feby., 1927—home and bed. (11) Have you been an inmate of a hospital, asylum, sanitarium, home, or health resort of any kind? If so, give dates, place and full particulars. Washington Sanitarium, Washington, D. C., 9/6/27. Tucker Sanitarium, Richmond, Va., 5/27/27." This was accompanied by Friend's statement, in part as follows: "(7) When did his present illness begin? About 3 years ago. (8) What is the nature of his present illness? General debility, superinduced, in my opinion, by pellagra. (9) Is he at the present time improving? Can't say. (10) Is he, in your opinion, totally and permanently incapacitated from following any business or profession for gain or profits? Yes." The claimant's statement was signed by plaintiff's intestate, but prepared by the bookkeeper for plaintiff's company, with plaintiff's intestate's son and in the absence of plaintiff's intestate.

Plaintiff's intestate's physician attended him from 8 November, 1926. He had pellagra, complicated by mental symptoms. The physician testified: "In my opinion, Mr. Nelson was continuously disabled from the 8th of November, 1926, because he was not rational or apparently rational, long enough, I do not think, to transact any business that would be satisfactory. His physical condition, during that time, was very poor. . . . *I don't think he had the ability to attend to business, physical or mental,* from that time until 17 October, 1928. In my opinion *he was physically and mentally diseased.*" The defendant admitted and paid disability benefits from 27 October, 1928, when guardian was appointed until his death.

Similar testimony was given by his wife, two sons, brother-in-law and druggist. His wife was asked the following: "What, in your opinion, was his physical condition at that time, with respect to ability to follow any occupation for remuneration or profit? Answer: *He was both disabled mentally and physically,* I know, to pursue any occupation. *I do not reckon that; I know that.* Q. How long did that condition continue? A. It grew worse all the time, and we usually had an attendant with him all the time, because he had these hallucinations or delusions all the time, and of course we were afraid for him to go anywhere, and I watched him all the time, or one of the boys watched him every night. We had a colored man all the time except when one of the boys was with him." These and similar questions and answers were objected to by defendant when the questions were asked numerous witnesses for plaintiff, but the court below allowed them and in this we think there was no error.

We do not think that *Stanley v. Lumber Co.,* 184 N. C., 302, applicable. That was a personal injury case, and the witness could not express an opinion on the point in issue, but there are exceptions. See *Barnes v. R. R.,* 178 N. C., 264.

In *White v. Hines,* 182 N. C., at p. 279, the law is thus stated: "The defendants offered in evidence a paper-writing purporting to be the ward's receipt for $554 and a release of the railroad company from all liability resulting from the derailment. The plaintiff replied that Samuel A. White was mentally incapacitated to such an extent that at the time of its execution he could not comprehend the nature and effect of the instrument to which he had affixed his signature. Evidence as to White's mental condition, then, was both material and essential. The defendants contended that testimony to the effect that he 'was crazy' or 'not normal,' was the statement of a positive conclusion, or fact, and, for this reason, incompetent. But in this jurisdiction it is established that a nonexpert witness, who has had conversation and dealings with another, and a reasonable opportunity, based thereon, of forming an opinion as to the mental condition of such person, is not disqualified on the ground that his testimony is a mere expression of opinion. *McLeary v. Norment,* 84 N. C., 235; *In re Stocks,* 175 N. C., 224; *In re Broach,* 172 N. C., 522. One not an expert may give an opinion, founded upon observations, that a certain person is sane or insane. *Whitaker v. Hamilton,* 126 N. C., 470; *Clary v. Clary,* 24 N. C., 78."

From the finding of the jury that the disability took place 1 April, 1927, we think that the refusal to give certain instructions prayed by defendant becomes immaterial. The contentions of the parties were fairly given and the charge covered all the material aspects of law presented by the evidence. The issues submitted were proper from the pleadings and determinative of the controversy. The charge does not impinge C. S., 564. Taking the charge as a whole, we do not think there was any error in not giving the prayers for instructions as prayed for by defendant. Taking the evidence in the light most favorable for plaintiff, on all the evidence, it was amply sufficient to support the verdict. In the judgment there is

No error.

A. P. THORPE AND W. S. WILKINSON v. HENRY C. PARKER, JOHN LEGGETT AND JONAS JONES.

(Filed 17 September, 1930.)

Estoppel B b—Judgment roll may be introduced in evidence as estoppel without pleading such estoppel where it is not relied on as defense.

A former judgment involving the same controverted title to lands between the parties under whom the plaintiffs and defendants claim title to the *locus in quo* may be introduced in evidence by the plaintiff as an estoppel without pleading an estoppel by judgment, although when relied upon as a defense it must be pleaded.

CONNOR, J., not sitting.

CIVIL ACTION, before *Cowper, Special Judge,* at March Special Term, 1930, of NASH.

The plaintiffs, alleging that they were tenants in common of the land in controversy, instituted an action of ejectment against the defendants. The plaintiffs claim title under Cornelia Parker Bullock, and introduced the judgment roll in a former case entitled Cornelia Parker Bullock *v.* Jeffrey Parker, under whom the defendants claim title. The defendants objected to this evidence. The trial judge gave peremptory instructions to the jury, and from the verdict in favor of plaintiffs the defendants appeal.

Battle & Winslow and W. S. Wilkinson, Jr., for plaintiffs.
T. T. Thorne for defendants.

PER CURIAM. The plaintiffs introduced the judgment roll in a former case between the parties under whom both plaintiffs and defendants respectively claim title. This evidence was relied upon as an estoppel. The defendants objected to the introduction of the evidence upon the ground that the estoppel by judgment was not pleaded, but the law has been settled contrary to the contention of the defendants. *Stancill v. James,* 126 N. C., 190, 35 S. E., 245; *Moody v. Wike,* 181 N. C., 509, 107 S. E., 457; *Bullard v. Insurance Co.,* 189 N. C., 34, 126 S. E., 179. These decisions hold that the record and judgment, in a former action between the same parties or their privies, involving title to the same tract of land, may be offered in evidence, although not pleaded in the complaint; but when an estoppel is relied upon as a defense, it must be pleaded.

No error.

CONNOR, J., not sitting.

W. H. IVEY, ADMINISTRATOR OF WILLIAM HENRY VALENTINE, DECEASED, v. EASTERN COTTON OIL COMPANY.

(Filed 24 September, 1930.)

Master and Servant C b—Evidence in this case held insufficient to be submitted to the jury and nonsuit was proper.

Evidence tending to show that the deceased was employed by the defendant to keep seed from choking steel tunnels in the defendant's seed house, and that the deceased was found dead in the bulk of seed, without evidence of a slide of seed precipitating the deceased into the tunnel, but to the contrary that the deceased's pitchfork was sticking up in the seed at the mouth of the tunnel after the accident, with testimony of a physician who examined the body that he could not tell whether the deceased died from heart failure or smothering, with further evidence that the seed house was properly constructed and the methods of work were approved and in general use, is *held:* insufficient to be submitted to the jury, and defendant's motion as of nonsuit was properly allowed.

CIVIL ACTION, before *Small, J.,* at June Term, 1930, of HALIFAX.

The defendant owned and operated a seed house in Weldon. This house is about 200 feet long, 60 feet wide, and 50 feet high, and during the operating season is kept practically full of seed. The seed are conveyed to said seed house by mechanical conveyers which take the seed up and dump them in the top of the house by means of a chute which enters the house on the west side near the top. Along the center of the room there is a steel tunnel constructed over the conveyers, which carry the seed from the seed house, in order to protect the workmen feeding seed into the conveyers. The sides of the tunnel are open for a space of about two feet above the floor in order that seed may roll into the conveyers through this opening. Employees are stationed inside the tunnel charged with the duty of preventing the seed from choking the openings. In December, 1928, the deceased Valentine was working on top of the seed and assigned to the duty of keeping the seed away from the gin chute. The pile of seed apparently was approximately forty feet high. In order to perform his duties the deceased used a pitchfork to throw the seed into a funnel-shaped hole extending from the top of the pile of seed to the floor. A witness for plaintiff testified: "Everything was working all right when somebody's hat came where I was feeding. I picked it up and looked at it. It came on down on the seed from where Valentine was standing. . . . I picked it up and turned it over and ran to the door where the man who runs the elevator was and asked him whose hat it was. He said it was Valentine's hat." In a few minutes the body of the deceased rolled down with the seed near the conveyer. "When Valentine came down with the seed his face was all sweaty and snuff and cotton seed were in his mouth when they got him up."

There was evidence that the pitchfork used by the deceased was sticking up in the pile of seed at or near the place where he was working a few minutes before he disappeared.

Dr. Lassiter, a physician, was called and made an effort to resuscitate the deceased by artificial respiration. The said physician testified: "I do not know for sure whether he died from being smothered or from heart failure."

The uncontradicted evidence tended to show that the seed house was properly constructed for the business carried on, and that the methods of doing the work were approved and in general use.

At the conclusion of the evidence there was judgment of nonsuit, and the plaintiff appealed.

Travis & Travis for plaintiff.
Spruill & Spruill and George C. Green for defendant.

BROGDEN, J. The only question of law presented is whether there was sufficient evidence of negligence to be submitted to the jury. The sole element of negligence relied upon as a basis of liability is whether the cotton seed caved in, thus precipitating the body of plaintiff's intestate into the funnel where he was smothered by the crushing flow of the seed. The evidence, however, does not disclose a slide of seed at the time the body of plaintiff's intestate was discovered. Indeed, the uncontradicted testimony tends to show that the fork used by the deceased was standing up in the pile of seed at or near the place where he was working a few minutes before his body rolled into the tunnel below. This physical fact tends to negative the theory of a seed slide into the funnel. Furthermore, the physician who examined the body shortly after death declared that he was uncertain whether the deceased "died from being smothered or from heart failure." Therefore, the evidence viewed in a liberal light, fails to disclose the essential fact of negligence as the proximate cause of the death. Thus, ultimate liability rests exclusively upon conjecture. Under such circumstances the rule of law established by an unbroken line of judicial declaration is that "evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it is so, is an insufficient foundation for a verdict and should not be left with the jury." *S. v. Vinson,* 63 N. C., 335; *Wittkowsky v. Wasson,* 71 N. C., 451; *Byrd v. Express Co.,* 139 N. C., 273, 51 S. E., 851; *Warwick v. Ginning Co.,* 153 N. C., 262, 69 S. E., 129; *Pangle v. Appalachian Hall,* 190 N. C., 833, 131 S. E., 42; *Wilson v. Lumber Co.,* 194 N. C., 374, 139 S. E., 760; *S. v. Swinson,* 196 N. C., 100, 144 S. E., 555.

The case at bar is somewhat similar to *Warwick v. Ginning Co., supra.* In that case "the seed slipped or gave way and plaintiff's foot was drawn into the conveyer and injured." Recovery was denied upon the theory that the plaintiff had equal knowledge with the defendant of the conditions surrounding the work and was permitted to do his work in his own way—the Court remarking, "There is no special knowledge required to throw the seed in a hole."

Upon the whole record, we are of the opinion that the judgment of nonsuit was proper.

Affirmed.

JOHN J. FIELDS v. EQUITABLE LIFE INSURANCE COMPANY.

(Filed 24 September, 1930.)

Removal of Causes D a—Amount in controversy in this case held not to be sufficient for removal to Federal Court.

Upon a petition and bond for the removal of a cause from the State to the Federal Court on the ground that more than three thousand dollars is involved, the test is the value of the property of which the defendant may be deprived by the judgment demanded, and not the amount of the claim of the plaintiff, but where in an action on a disability clause in a life insurance policy the demand is for installments alleged to have already accrued thereunder, in an amount less than the jurisdictional limit, the petition for removal is properly denied, although the defendant may contest its liability for future installments in the present action.

CIVIL ACTION, before *Small, J.*, at August Term, 1930, of JOHNSTON.

The plaintiff alleged that on 9 February, 1921, the defendant issued to him a life insurance policy in the sum of $5,000, and that said policy contained a total and permanent disability clause for which an additional premium was required. Said disability clause provided in substance that in the event the insured should become physically or mentally incapacitated "to such an extent that he is and will be wholly and presumably permanently unable to engage in any occupation or perform any work for compensation of financial value, and furnishes due proof thereof and that said disability has then existed for sixty days, the Society, during the continuance of such disability, will waive payment of any premium payable upon this policy after receipt of such proof, and will pay to the insured an income of six hundred dollars a year, payable in monthly installments." The policy further provided "if the insured should fail to furnish satisfactory proof of disability or if it appears at any time that the insured has become able to engage in any occupation for remuneration or profit, no further premiums will be waived and no further income payments will be made hereunder on account of such disability."

It was further alleged that the plaintiff became totally incapacitated, and that the defendant paid certain installments until 9 May, 1923, and refused to pay any installments thereafter.

In September, 1923, the plaintiff instituted an action to recover income installments as provided by said policy. After an appeal to the Supreme Court, reported in 195 N. C., p. 262, plaintiff recovered, and the judgment was paid by the defendant.

Thereafter, on 5 August 1929, the present suit was instituted for the purpose of recovering $2,950, same being installments accrued under said policy from 1 October, 1924, up to the date of institution of this action, to wit, 5 August, 1929.

In apt time the defendant filed petition for removal to the Federal Court, specifying as a ground for removal that the defendant was a foreign corporation, and that the amount in controversy exceeded $3,000 exclusive of interest and costs. The defendant contends that the validity of the policy itself and liability for future installments are at issue, and that, therefore, more than $3,000 is involved in this suit. The clerk of the Superior Court denied the petition for removal, and the judgment of the clerk was affirmed by the trial judge. Thereupon the defendant appealed.

J. Ira Lee, W. H. Massey, James D. Parker and G. A. Martin for plaintiff.

S. Brown Shepherd and Winfield H. Lyon for defendant.

PER CURIAM. In cases involving removal to the Federal Court on the ground that more than $3,000 is involved, the test is the value of the property of which the defendant may be deprived by the judgment demanded, rather than the amount of the claim of plaintiff alone, where, of course, such claim upon its face does not exceed the jurisdictional limitations. *Harrison v. Allen,* 152 N. C., 720, 68 S. E., 207.

It appears from the complaint that the policy of insurance provides that if the insured shall at any time become able to engage in any gainful occupation or shall fail to furnish satisfactory proof of continuance of total disability, then in such event the defendant is under no obligation to waive premiums or pay income installments.

The cause of action stated in the complaint is for installments alleged to have accrued under the policy from 1 October, 1924, to 5 August, 1929. These do not exceed the jurisdictional limit. The defendant can contest its liability therefor, under the express terms of the contract, not only in this action, but in any subsequent action for future installments. Hence, the only property which the defendant may be deprived of by the judgment demanded in this action is the accrued installments, aggregating $2,950. Therefore, the petition for removal was properly denied. *Wright v. Insurance Co.,* 19 Fed. (2), 117.

Affirmed.

MRS. MARY FLOWERS, for Herself and Such Other Creditors of J. W. Parker as Come in and Make Themselves a Party to This Proceeding, v. AMERICAN AGRICULTURAL CHEMICAL COMPANY and WYATT E. BLAKE, Trustee, and J. W. PARKER.

(Filed 24 September, 1930.)

Fraudulent Conveyances A d—Debtor whose assets exceed his indebtedness is not insolvent and his conveyance may not be set aside.

A debtor is not insolvent within the intent and meaning of the statute when his entire assets equal or exceed his entire indebtedness, and where a solvent debtor conveys practically all of his property to secure a preexisting debt, having other creditors at the time, it does not create a preference within the intent and meaning of C. S., 1611, nor is it in effect an assignment for the benefit of creditors requiring a filing of an inventory within the meaning of C. S., 1610, and judgment for defendants in an action to set aside such conveyance is proper, and *held further*, there was no sufficient evidence of intent to defraud creditors to warrant the submission of an issue thereon.

Appeal by plaintiffs from *Cowper, Special Judge,* and a jury, at March Term, 1930, of Wayne. No error.

This is an action brought by plaintiffs against defendants to set aside a deed of trust. The issues submitted to the jury and their answers thereto, were as follows:

"1. Did the defendant, J. W. Parker, on 4 June, 1927, execute a deed of trust purporting to secure a preëxisting indebtedness to the American Agricultural Chemical Company? Answer: Yes. (By admission.)

2. Was the defendant, J. W. Parker, insolvent on 4 June, 1927? Answer: No.

3. Did the defendant, J. W. Parker, on said date owe other unsecured creditors not protected by said instrument? Answer: Yes.

4. Did said paper-writing or deed of trust contain and convey all or practically all of J. W. Parker's property? Answer: Yes.

5. Did Wyatt E. Blake, trustee, file inventory as required by section 1610, C. S. of North Carolina? Answer: No. (By admission)."

J. Faison Thomson for plaintiff.
Paul B. Edmundson and Hugh Dortch for defendants.

Clarkson, J. We can find in the record no sufficient evidence to be submitted to the jury that the deed of trust was made with intent to defraud the creditors of J. W. Parker, therefore the court below was correct in refusing to submit the issue. J. W. Parker, who made the deed of trust, a witness for plaintiffs, testified: "I did not execute this deed of trust intending to perpetrate a fraud on my other creditors."

We can see no error in the judgment on the issues as found by the jury. *Wallace v. Phillips,* 195 N. C., 665; *Bank v. Mackorell,* 195 N. C., 741.

In *Cowan v. Dale,* 189 N. C., at p. 686, citing numerous authorities, it is said: "The chattel mortgage did not create a preference within the meaning of C. S., 1611; but the plaintiff asserts that in effect it was an assignment for the benefit of creditors and void because the trustees or mortgagees did not file an inventory as required by section 1610. It has been held that where one who is insolvent makes a mortgage of practically all his property to secure one or more preëxisting debts the instrument will be considered an assignment and the result will not be charged by the omission of a small part of his property; but to apply this doctrine it is necessary to show that the grantor was insolvent; that the secured debts were preëxisting, and that there were other creditors."

The court below charged the jury as follows: "And the court instructs you that the words 'solvent' and 'insolvent' respectively means 'able' or 'unable' to pay, and whether the word be used to define the condition of a deceased's estate or the financial status of a living person, its signification is the same; it means inability to meet liabilities after converting all of the property or assets belonging to a person into money at the market price and applying the proceeds with the cash which the party may have, if any, to the payment of debts. Solvency or insolvency depends upon whether the entire assets of a person equal the value of his total indebtedness. If the entire assets of a person equal or exceed his entire debts he is solvent. If his entire assets are less than his entire indebtedness, he is insolvent."

Plaintiff excepted and assigned error to the above charge. This cannot be sustained. This charge, in substance, is taken from *Mining Co. v. Smelting Co.,* 119 N. C., p. 418, citing numerous authorities, and we see no reason to disturb it. In fact, we repeat what was further said in that case: "It would prove subversive of settled principles, and would tend to impair credit and embarrass trade, to give our sanction to a definition of an insolvent that would bring within the class of which it is descriptive every person, natural or artificial, who in the course of active business is unable to meet the demands of creditors without borrowing money."

We do not think the other exceptions and assignments of error made by plaintiffs tenable. We see no prejudicial or reversible error. On the record we find

No error.

STATE v. HATTIE BURKE.

(Filed 24 September, 1930.)

Profane Language A b—In this case held: evidence that place where defendant used profanity was a public highway was sufficient.

Where an owner has plotted his lands into lots with dividing streets and has sold some of the lots, there is a dedication to the public use as between the parties, and where in a prosecution for using profane or indecent language upon a public highway in the hearing of one or more persons, the evidence tends to show that the defendant used profane language in the hearing of others on a street so dedicated, that the street had several houses thereon and that the adjacent owners had worked the street and that it had been used by the public for a period of ten or more years, the evidence that the highway was public within the meaning of the statute is sufficient to be submitted to the jury and sustain a verdict of guilty.

APPEAL by defendant from *Cranmer, J.*, and a jury, at July Term, 1930, of HERTFORD. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

C. Wallace Jones and Lloyd J. Lawrence for defendant.

CLARKSON, J. The defendant was charged with violating C. S., 4352. This section, in part, is as follows: "If any person shall, on any public road or highway and in the hearing of two or more persons, in a loud and boisterous manner, use indecent or profane language, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days," etc. (Certain counties exempted.)

The defendant was tried and convicted on a warrant duly sworn out before a justice of the peace. From the judgment of the justice of the peace defendant appealed to the Superior Court. The defendant was there tried *de novo* and convicted by a jury, and appealed from the judgment rendered to this Court.

The only material exception and assignment of error made by defendant, necessary to be considered, was to the charge of the court below holding that the evidence was sufficient to be submitted to the jury; that the place where the language was used was a public road or highway. The prosecutrix, Sadie Manly, testified on this aspect: "I live in Cofield, in Hertford County. I was at home on the afternoon of 3 July, 1930; my home is located on a street or avenue in Cofield. The street on which I live leads from the Cofield-Ahoskie county road to a field, and my home is located about 100 yards from the Winton-Ahoskie road.

There are only four homes on the street, one of which I occupy. I have lived at my present home for about ten years and this street has been open all of that time, and the street on which I live has been used by the traveling public for the use of automobiles and other vehicles for the whole time that I have lived there. . . . Cofield is not an incorporated town. This street is kept up by those of us living on it. This street has never been worked by any of the road authorities and all the work that has been done on it in the ten years that I have lived on it has been done by my husband and Vivian Nickens, who lives next door to me."

W. A. Perry testified: "The street or avenue on which Sadie Manly lives has been opened for sixteen years. I have lived within two miles of Cofield all my life. I carried the chain when this street was surveyed sixteen years ago. Mr. Williams owned the land and cut it up into lots, and laid out this street for the use of the public and those who bought lots on it. This street has been used by the traveling public for the past sixteen years, and it is wide enough for two or three cars to pass. It is connected with the Winton-Harrellsville road, and you can travel all the way from the Cofield-Ahoskie road to the Winton-Harrellsville road."

There is no question made as to the evidence being sufficient to be submitted to the jury as to the other ingredients of the offense. So the sole question: was the place a public road or highway in contemplation of the statute? We think so.

We do not think that a reasonable construction of the present statute, that it can be said, that the only public road or highway is one that the public authorities have acquired in the different methods provided by law and worked and kept up by them.

In *Wittson v. Dowling,* 179 N. C., at 544-5, we find the following: "It is the recognized principle here and elsewhere that, when the owner of suburban property or other has the same platted, showing lots, parks, streets, alleys, etc., and sells off lots or any of them, in reference to the plat, this, as between the parties, will constitute a dedication of the streets, etc., *for public use, although not presently opened or accepted or used by the public.* (Italics ours.) *Elizabeth City v. Commander,* 176 N. C., 26; *Wheeler v. Construction Co.,* 170 N. C., 427; *Green v. Miller.* 161 N. C., 25." *Irwin v. Charlotte,* 193 N. C., 109.

The present statute was passed, no doubt, to cover cases of this character that the common law did not reach. At common law in *S. v. Chrisp,* 85 N. C., 528, it was held that the continued and public use of profane oaths, frequently and boisterously repeated, though on a single occasion and but for the space of five minutes, is indictable as a public nuisance. In the judgment we find

No error.

B. E. BATTEN v. CORPORATION COMMISSION OF NORTH CAROLINA ET AL.

(Filed 24 September, 1930.)

Life Estates B b—Remainderman must have good vested title in order to bring an action for waste against life tenants.

In an action to recover for waste against a life tenant it is required that the remainderman have a good and not a doubtful title, and where the plaintiff in an action therefor claims as heir at law of the grantor who had conveyed the property to B. for life, then to B.'s children, the title of the plaintiff depends upon the death of B. without children, and he cannot maintain the action. C. S., 888.

APPEAL by plaintiff from *Sinclair, J.*, at February Term, 1930, of JOHNSTON. Affirmed.

This action for the recovery of damages for waste, and for the forfeiture of the life estate of C. I. Batten, under whom defendants claim title to the land described in the complaint, C. S., 888, *et seq.*, was heard on plaintiff's motion that the temporary restraining order be continued to the final hearing and that a receiver be appointed, *pendente lite*, with authority to take possession of the land and to collect the rents and income therefrom.

From judgment denying the motion, dissolving the restraining order, and declining to appoint a receiver, plaintiff appealed to the Supreme Court.

R. L. Ray, Sr., for plaintiff.
I. M. Bailey for defendant.

CONNOR, J. Defendants are in possession of the land described in the complaint, claiming an estate therein *per autre vie.*

This land was conveyed in 1898, by J. M. Batten and his wife to C. I. Batten for his lifetime, and then to his children. It was not made to appear at the hearing that C. I. Batten is dead. He has no living children and is now 55 years of age. Plaintiff claims title to an undivided four-fifths interest in said land, subject to the life estate of C. I. Batten. He is one of five children of J. M. Batten; three of said children have conveyed to plaintiff all their right, title and interest in and to said land.

It is manifest that plaintiff's title, if any, to the remainder in said land, after the death of C. I. Batten, is not sufficient to sustain this action. *Hough v. Martin,* 22 N. C., 379. In an action for the recovery of damages for waste, committed by a life tenant, the plaintiff must establish a good, and not a doubtful title to the remainder. The judgment is

Affirmed.

STATE v. C. H. ROSS.

(Filed 24 September, 1930.)

Criminal Law F a—In this case held: defendant was twice tried for same offense, and judgment is arrested on appeal to Supreme Court.

Where a defendant is bound over to the County Court on two warrants for issuing worthless checks on different dates, and is acquitted as to one and convicted as to the other, and appeals to the Superior Court, and in the trial in the Superior Court the evidence relates to the charge upon which he had been acquitted in the County Court, upon the jury's acceptance of his plea of former acquittal, it is error for the trial court to order another trial, and upon conviction therein the judgment will be arrested on appeal.

APPEAL by defendant from *Barnhill, J.*, at April Term, 1930, of PITT.

Criminal prosecution tried upon a warrant charging the defendant with uttering and delivering to Pitt Chevrolet Company on 16 January, 1929, a $35.00 check in violation of chapter 62, Public Laws, 1927, generally known as the "Bad Check Law."

Two warrants were issued against the defendant by J. I. Smith, justice of the peace, on the same day, one charging him with giving a $35.00 check to the Pitt Chevrolet Company in violation of the statute on 16 January, 1929, and the other with giving a $35.00 check to Pitt Chevrolet Company in violation of the statute on 13 February, 1929. The magistrate found probable cause and bound the defendant over to the County Court of Pitt County on both warrants. In the County Court he was convicted on the first warrant and acquitted on the second, and from his conviction on the first, he appealed to the Superior Court. On the trial in the Superior Court, the evidence related to the check of 13 February, 1929, for the issuance of which the defendant had previously been acquitted in the County Court; whereupon the jury returned a verdict of not guilty, accepting the defendant's plea of former acquittal. The court then ordered another trial, assuming, no doubt, that the first trial was a nullity, as the evidence related to the check covered by the second warrant and not to the one covered by the first. The defendant entered a plea of "former jeopardy, former acquittal, and not guilty."

Verdict: Guilty.

Motion in arrest of judgment overruled; exception.

Judgment: Fine of $50.00 and the costs.

Defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Julius Brown for defendant.

STACY, C. J. It appears on the face of the record that the defendant has been tried twice in the Superior Court on the same warrant. He was acquitted on the first trial and convicted on the second. The Attorney-General confesses error. The judgment will be arrested. *S. v. McKnight,* 196 N. C., 259, 145 S. E., 281.

Error.

N. G. RAND ET UX. v. R. C. GILLETTE.

(Filed 24 September, 1930.)

Estoppel B a—Party is estopped from maintaining position contrary to position taken in former action.

Where creditors bring suit to set aside a debtor's encumbrance on land, alleging that the mortgage or deed of trust was not bona fide and that the note it secured had been paid, and the debtor files an affidavit in the action that the note had not been paid, the judgment in the suit works an estoppel against the debtor from maintaining in a suit to foreclose the same encumbrance that his affidavit was erroneous and that the debt had been paid contrary to his affidavit filed in the previous action. *Distributing Co. v. Carraway,* 196 N. C., 58, cited and applied.

APPEAL by plaintiffs from *Sinclair, J.,* at February Term, 1930, of JOHNSTON.

Civil action to restrain the defendant from foreclosing certain mortgages or deeds of trust on the ground that the debts secured thereby have been fully paid and satisfied.

A similar action was brought in 1929 by a judgment creditor of N. G. Rand, alleging that said instruments were not bona fide encumbrances, but that they had been paid, etc. N. G. Rand was a party to that proceeding, filed an affidavit denying the allegations of the complaint, and it was finally adjudged in said action that "the temporary restraining order be, and the same is declared dissolved and the said R. C. Gillette is hereby empowered to proceed to foreclose the said mortgages, after due advertisement, according to law."

N. G. Rand is now making the same contention that was made by his judgment creditor in the 1929 suit, to wit, that said instruments are not bona fide encumbrances, but have been paid in the same way the judgment creditor alleged in 1929 that they had been paid. It is not contended that they have been paid since the institution of the creditor's suit, but plaintiff says he did not read the affidavit signed by him and used in that suit and that it contains a number of inferences which are "not accurate as stated therein."

His Honor held that the judgment in the prior action was a bar to the present proceeding, and dismissed the action. The plaintiffs appeal, assigning errors.

James D. Parker and Wellons & Wellons for plaintiffs.
Leon G. Stevens and Abell & Shepard for defendant.

STACY, C. J. The judgment must be affirmed on authority of what was said in *Distributing Co. v. Carraway,* 196 N. C., 58, 144 S. E., 535. A party is not permitted to take a position in a subsequent judicial proceeding which conflicts with a position taken by him in a former judicial proceeding, when the latter position disadvantages his adversary. *Hardison v. Everett,* 192 N. C., 371, 135 S. E., 288.

The plaintiff is face to face with the lesson, taught every day in the school of experience, that he cannot safely "run with the hare and hunt with the hound." He induced the court to adjudge the instruments in suit as valid and subsisting liens in 1929. If this were erroneous, as he now alleges, he has no one to blame but himself.

The plaintiff may have his remedy at law, but equity having heard him once will not listen to him now in reversal of his former position on the same subject. The doctrine of equitable estoppel is based on an application of the golden rule to the every-day affairs of men. It requires that one should do unto others as in equity and good conscience he would have them do unto him, if their positions were reversed. *Boddie v. Bond,* 154 N. C., 359, 70 S. E., 824. Its compulsion is one of fair play. *Sugg v. Credit Corp.,* 196 N. C., 97, 144 S. E., 554.

Affirmed.

CAMPBELL E. SMITH, ADMINISTRATOR OF E. W. LANGLEY, v. C. E. SMITH AND W. E. COBB.

(Filed 24 September, 1930.)

1. **Appeal and Error C a—Where time for serving statement of case on appeal has expired, trial court is without power to settle case.**

Where upon the settlement of the case on appeal by the trial court a controversy arises between the parties as to whether the case was served within the time fixed, or allowed, or service within such time waived, the duty of the trial court is to find the facts, hear motions and enter appropriate orders thereon, and when it appears of record that the case was not served in time the trial court is without power to settle it, and his attempted settlement will be disregarded on appeal.

2. **Same—Where statement of case on appeal is not served in time it does not work dismissal and Court will review record proper.**

The allowance by the Supreme Court of a *certiorari* does not affect the time within which the case on appeal must be served, but where the appellant has not served his case in the time fixed or allowed, it does not warrant a dismissal, and the Supreme Court will review the record proper for error, and in the absence of error appearing upon its face, affirm the judgment appealed from.

APPEAL by defendant, W. E. Cobb, from *Johnson, Special Judge,* at January Term, 1930, of PITT.

Motion by plaintiff to affirm judgment.

The case was tried at the January Term, 1930, Pitt Superior Court, and resulted in a verdict and judgment for the plaintiff. The defendant, W. E. Cobb, gave notice of an appeal to the Supreme Court. By agreement of counsel, appellant was allowed sixty days within which to prepare and serve statement of case on appeal, and the plaintiff was allowed thirty days thereafter to file exceptions or countercase. Application for *certiorari* was made at the Spring Term, 1930, of the Supreme Court, and allowed, the writ issuing 3 March.

Appellant's statement of case on appeal was served 7 August, 1930. Fourteen days thereafter, plaintiff's counsel filed exceptions, but protested against any settlement of the case on the ground that "the time for serving case on appeal expired in April, and the said case was not served until 7 August, 1930." In response to notice, counsel appeared before the judge at the time of settling case, renewed his protest and moved to dismiss the appeal.

The record contains the following entry: "The trial judge did not pass upon the question as to whether the case on appeal was served within the time fixed by law for the service of case on appeal, nor whether the exceptions and countercase filed by the appellee constitutes a waiver of such service, deeming this a matter to be passed on by the Supreme Court."

S. J. Everett for plaintiff.
Henry C. Bourne for defendant Cobb.

STACY, C. J. Where there is a controversy as to whether the case on appeal was served within the time fixed or allowed, or service within such time waived, it is the duty of the trial court to find the facts, hear motions and enter appropriate orders thereon. *Holloman v. Holloman,* 172 N. C., 835, 90 S. E., 10; *Barrus v. R. R.,* 121 N. C., 504, 28 S. E., 187; *Walker v. Scott,* 102 N. C., 487, 9 S. E., 488; *Cummings v. Hoffman,* 113 N. C., 267, 18 S. E., 170.

It appears, without contradiction, that appellant's statement of case on appeal was not served within the time allowed by agreement of counsel, hence the judge was without authority to settle the case. *Lindsey v. Knights of Honor,* 172 N. C., 818, 90 S. E., 1013; *Cozart v. Assurance Co.,* 142 N. C., 522, 55 S. E., 411; *Barber v. Justice,* 138 N. C., 20, 50 S. E., 445. And his attempted settlement of the case, without finding that service within the stipulated time had been waived, did not cure the defect. *McNeill v. R. R.,* 117 N. C., 642, 23 S. E., 268; *Forte v. Boone,* 114 N. C., 176, 19 S. E., 632.

The "case," therefore, as settled, must be disregarded. *Cummings v. Hoffman, supra.*

Application for *certiorari* was made at the Spring Term of this Court and allowed, but this did not change the time already fixed by agreement of the parties, for serving statement of case on appeal, and exceptions or countercase.

There being no case on appeal, legally settled, does not, however, entitle the appellee to have the appeal dismissed. *Roberts v. Bus Co.,* 198 N. C., 779; *Wallace v. Salisbury,* 147 N. C., 58, 60 S. E., 713. But as no error appears on the face of the record proper, the judgment must be affirmed. *Delafield v. Construction Co.,* 115 N. C., 21, 20 S. E., 167.

Affirmed.

ROCKY MOUNT SAVINGS AND TRUST COMPANY ET AL. v. ÆTNA LIFE INSURANCE COMPANY.

(Filed 24 September, 1930.)

1. **Insurance E d—Where no definite time is set within which insurer is to act on application for reinstatement, it must act within reasonable time.**

   Where no definite time is fixed by a policy of life insurance in which the insurer is to act upon the insured's application for reinstatement of the policy, upon a forfeiture of the policy for nonpayment of premiums and the insured's applying for reinstatement of the policy according to its provisions, it is the duty of the insurer to pass upon the application for reinstatement within a reasonable time, not arbitrarily, but upon reasonable grounds in the exercise of reasonable prudence and diligence.

2. **Same—Whether insurer failed to act on application for reinstatement within reasonable time is held a question for jury in this case.**

   A provision in a policy of life insurance whereby the insurer agrees to reinstate the policy after it has become forfeited for nonpayment of premiums upon certain conditions, gives a substantial right to the insured, and where the insured makes application for reinstatement to the general agent of the insurer who issues a conditional receipt for the amount required for reinstatement upon the back of which the insured is advised that if he fails to hear from the insurer within sixty days "notify the company at the home office": *Held*, there is no definite time fixed within which the insurer is to act upon the application for reinstatement, and where the insurer has not acted thereon sixty-two days after the application, upon the death of the insured and demand by the beneficiary for payment of the policy an issue of fact is raised for the determination of the jury as to whether the insurer failed to act thereon within a reasonable time.

3. **Insurance J b—Forfeiture of insurance contracts are not favored but forfeiture will be enforced if plainly incurred.**

In construing a contract of life insurance the law will avoid a forfeiture for nonpayment of premiums when this can be done by reasonable construction, but a forfeiture will be enforced if plainly incurred by the terms of the policy unless there is an express or implied waiver by the insurer.

4. **Insurance K c—Failure of insurer to act on application for reinstatement within reasonable time operates as waiver of forfeiture.**

Where an application for reinstatement of a policy of insurance has been made according to the provisions of the policy, it is the duty of the insurer to act thereon within a reasonable time, and where it fails to so act it will be held to have waived the right to declare the policy forfeited, and under the facts of this case the question of whether the insurer failed to act within a reasonable time is for the determination of the jury.

CIVIL ACTION, before *Cowper, Special Judge,* at March Special Term, 1930, of NASH.

The plaintiffs are the administrators of the estate of Theodore N. Ross, deceased. The evidence tended to show that on 1 July, 1925, defendant issued to T. N. Ross, deceased, a policy of life insurance in the sum of $2,000, said policy being No. 515135. On 1 July, 1927, a premium on said policy fell due. The policy provided a grace of 31 days for the payment of premiums. Within the grace period the policyholder paid $10 upon the premium and received an extension agreement extending the time of payment of premium to 1 November, 1927. He failed to pay on 1 November, 1927, in accordance with the terms of the extension agreement. On 7 November, 1927, the policyholder received a letter from the general agent of defendant calling his attention to the fact that his policy had lapsed, and also to the further fact that the policyholder could submit his request for reinstatement. The letter contained the following clause: "If you are not prepared to pay the full amount of the premium of $26.72, we will be glad to accept a partial payment of $10 and extend the balance of the premium if you will sign enclosed extension note partially filled out. Please have revival form properly executed and return to us with extension note signed when we will ask the company to reinstate your policy and extend the balance of the premium for you."

In consequence of said letter the policyholder filed an application for reinstatement, dated 8 November, 1927. The application for reinstatement showed that the insured had suffered from an attack of gastritis since the policy had been issued, but that the attack was slight and that he was in sound health. The general agent recommended unreservedly the reinstatement of the policy. The request for extension was as follows: "Request for extension: Policy N-515135. The Ætna Life Insurance Company is hereby requested in consideration of the payment of ten dollars ($10) under above numbered policy on the life of T. N. Ross to extend the time to 60 days 19 ......, for the payment with interest of the premium on said policy which fell due ...., 19......... I agree that if the premium with interest is not paid in full within said extended period, said policy shall immediately lapse and become void except for any value to which it was entitled when said premium fell due. Theo. N. Ross (insured or beneficiary)." Thereupon, the agent issued to the insured the following receipt: "Form 257-G. No. 107230. Binding receipt for payment of premium. Received of Theodore N. Ross the sum of ten dollars on account of unpaid premiums with interest for reinstatement of insurance for two thousand dollars on the life of Theodore N. Ross under Policy No. 515135 issued by the Ætna Life Insurance Company, said reinstatement to be effective from this date provided the company shall be satisfied that on this date the applicant is eligible for reinstatement of the policy as a risk of the same class as when the policy was issued under its rules for reinstatement. If the company declines to reinstate the policy as requested, the consideration received will be returned on surrender of this receipt. Dated at Raleigh, N. C., this 8th day of November, 1927. W. F. Upshaw, Agent." (See reverse side.) The reverse side reads as follows: "Notice.—If you do not hear from the company in relation to reinstatement of policy within sixty days, notify the company at its home office at Hartford, Conn. This is a temporary receipt only. If the application for reinstatement is approved, a regular receipt signed by an executive officer of the company and countersigned by the agent will be given."

The insured died on 27 December, 1927, and up to the time of his death had not heard from the company as to whether it had decided to reinstate.

Subsequently the administrator of the deceased made demand upon the company for the payment of said policy, and on 10 January, 1928, the company offered to return the money and declined to recognize liability upon said policy. Paragraph 9 of the policy provides as follows: "How policy may be reinstated: Within five years after default in any premium payment, if this policy has not been surrendered, it may be reinstated upon evidence of insurability satisfactory to the company and by payment of arrears of premiums with interest at the rate of six per cent per annum, and by payment or reinstatement of whatever indebtedness to the company existed hereon at the date of default with interest from that date."

Vaughan & Yarborough and Cooley & Bone for plaintiffs.
Murray Allen for defendant.

BROGDEN, J. The determinative question of law is whether the forfeiture resulting from failure to pay the premium was waived by the defendant company.

The time for the payment of the premium due 1 July, 1927, was duly extended until 1 November of that year. The insured failed to pay the premium on 1 November, and, therefore, by virtue of the express terms of the contract, his policy lapsed subject, however, to the conditions of revival or reinstatement contained in paragraph 9 of said policy.

The defendant insists upon forfeiture. A long line of decisions in this Court and the uniform ruling of other courts throughout the country have established an axiom that the law abhors a forfeiture. Nevertheless, forfeitures are usually creatures of contract, and if plainly incurred, there is no sound reason why the courts should refuse to enforce them in the absence of express or implied waiver. This idea was expressed by *Chief Justice Clark* in *Hay v. Association,* 143 N. C., 256, when he wrote: "It is always sad when one who has made payments on his policy deprives his family of expected protection by failure to pay at a critical time. But insurance is a business proposition, and no company could survive if the insured could default while in good health, but retain a right to pay up when impaired health gives warning. . . . It is the insured's own fault when he does not make a payment as he contracted."

In the case at bar the plaintiffs rely upon the contention that the policy was reinstated, and that the defendant had waived the forfeiture. The methods by which the payment of premiums as contracted may be waived are discussed and applied in *Foscue v. Ins. Co.,* 196 N. C., 139, 144 S. E., 689. The principles of waiver are well settled, but the application of those principles to particular states of fact frequently engender difficulty. In this case, the policy in section 9 thereof conferred upon the policyholder the right to reinstatement upon failure to pay premium. This right is a substantial property right and by the terms of the contract must be exercised (a) within five years; (b) upon evidence of insurability satisfactory to the company and payment of arrears of premium, etc. The insured filed an application for reinstatement within five years and undertook to furnish evidence of insurability. The company had the right to pass upon the question of insurability and the evidence thereof submitted by the insured. Of course, it was the duty of the company to pass upon the insurability in the exercise of ordinary care and not to decline the application of the plaintiff for reinstatement upon any arbitrary ground not founded on reason or the exercise of reasonable prudence and diligence, because the policy itself created and recognized the right of reinstatement after default in the payment of a premium. The insured on or about 8 November, executed the request for extension which is referred to in the evidence as an extension note. An examination of the instrument, however, discloses that it was not a note but a request for an extension of time for 60 days to pay the premium, and the further agreement that if the premium with interest was not paid within said extended period that the policy would immediately lapse and become void. On the same date, to wit, 8 November, 1927, the general agent of the company issued a temporary receipt containing the following notice on the reverse side thereof: "If you do not hear from the company in relation to reinstatement of policy within 60 days, notify the company at its home office at Hartford, Conn. This is a temporary receipt only. If the application for reinstatement is approved, a regular receipt signed by an executive officer of the company and countersigned by the agent will be given." The defendant retained this receipt and took no action whatever with reference to the application of the insured for reinstatement until 10 January, 1928, thus covering a period of 62 days.

The plaintiffs contend that the failure to act upon the application for a period of 62 days was an unreasonable lapse of time from which a waiver may be inferred.

Manifestly, it was the duty of the defendant to pass upon the application for reinstatement with reasonable promptness and diligence under all the circumstances as they existed at the time. If parties agree upon a period of time in which an act is to be performed, and such period of time is reasonable upon its face, then the parties must abide the terms of the agreement. If no time for the performance of an obligation is agreed upon by the parties, then the law prescribes that the act must be performed within a reasonable time. Reasonable time is generally conceived to be a mixed question of law and fact. "If, from the admitted facts, the court can draw the conclusion as to whether the time is reasonable or unreasonable by applying to them a legal principle or a rule of law, then the question is one of law. But if different inferences may be drawn, or the circumstances are numerous and complicated, and such that a definite legal rule cannot be applied to them, then the matter should be submitted to the jury. It is only when the facts are undisputed and different inferences cannot be reasonably drawn from them, that the question ever becomes one of law." *Claus v. Lee,* 140 N. C., 552, 53 S. E., 433; *Blalock v. Clark,* 133 N. C., 306, 45 S. E., 642; *Blalock v. Clark,* 137 N. C., 140, 49 S. E., 88.

The notice, on the back or reverse side of the receipt referred to, does not undertake to fix a definite time when the company will pass upon the application. The notice in effect merely states that if the applicant or insured does not hear from the company within 60 days, he is at liberty to notify the home office. Hence no time was fixed by the company for determining the insurability of plaintiff's intestate, and his resultant right of reinstatement. Therefore, the principle of reasonable time for action by the company upon the application is applicable. The final and determinative inquiry, then, is whether the defendant acted within a reasonable time under all the facts and circumstances surrounding the parties when the application for reinstatement was filed.

If it did, the forfeiture was complete and no recovery is permissible. If it did not, the forfeiture is deemed to be waived.

Whether the defendant so acted, creates an issue of fact for a jury.

Reversed.

MINNIE B. JENKINS v. MORGAN FLOYD AND SOPHIE B. FLOYD.

(Filed 24 September, 1930.)

Fixtures A a—Affixed chattels in this case held to pass with realty as between vendor and purchaser.

Where a husband gives a deed to certain lands to his wife, the question of whether affixed chattels pass with the realty is determined as between vendor and purchaser, and where prior to the deed the husband places a cotton gin and corn mill in an outhouse on the land and uses them for his own crops and for profit for those of neighbors, applying the doctrine of fixtures, the gin and corn mill pass to the wife under the deed and are subject to her disposition by will and not the will of her husband.

APPEAL by defendant from *Devin, J.,* and a jury, at May Term, 1930, of WARREN. No error.

This action was instituted by Minnie B. Jenkins, the plaintiff, against Sophie B. Floyd and Morgan Floyd, her husband, the defendants, to recover the possession of a cotton gin and corn mill, including equipment and appurtenances. Plaintiff claimed ownership of the gin and corn mill under Item Four of the will of Mary E. Baird, mother of the plaintiff and the *feme* defendant, probated 17 May, 1929. The *feme* defendant claimed ownership thereof under Item Six of the will of J. J.

Baird, father of the plaintiff and the *feme* defendant, probated 10 March, 1925.

Item 5 of the will of Mary E. Baird is as follows: "I give and devise to my daughter, Minnie Baird Jenkins, fifty-five (55) acres of the Howard Gray tract of land now owned by me; this land shall be from an east and west line across the farm; the land devised in this clause shall be on the south side of the above-mentioned line and is situated partly in Virginia and partly in North Carolina. I also bequeath to my daughter, Minnie Jenkins, the right to reside in the house in which she now resides as long as she may wish to do so. I also wish her to have the use of my gin and corn mill as long as she may care to operate the same."

Item 6 of the will of J. J. Baird is as follows: "At the death of myself and wife, I bequeath to my daughter, Sophie E. Baird (now Morgan), all property belonging to me after carrying out the provisions of this will."

J. J. Baird on 10 April, 1917, deeded 10 acres of land at Elams, N. C., to his wife Mary E. Baird, known as the "Eaton Place," where the parties resided at the time the deed was made. On this place was the cotton gin and corn mill, which was willed to plaintiff. She lived in the house on the ten-acre tract.

The court below charged the jury, in part, as follows: "Therefore, the court is of the opinion that this cotton gin, according to the testimony, having been placed in a building on this land, and used as a cotton gin for the purpose of ginning cotton, and the corn mill placed in a building on this land and used for the purpose of grinding corn for the trade, for business; that being so situated in these buildings on the land it did, as a matter of law, become a part of the real estate, and passed under the deed from J. J. Baird to Mary E. Baird, and thereupon she would have a right to devise and will the use of that property as she might put in her last will and testament, and her last will and testament having been offered in evidence and admitted, that she did devise the use of the cotton gin and corn mill to her daughter, Minnie B. Jenkins, the court charges you if you find the facts to be true as testified, and as shown by all the evidence, both written and oral, that you will answer this issue that the plaintiff, Mrs. Jenkins, under the provisions of the will of Mary E. Baird, as alleged in the complaint. So, gentlemen, the issue is this: 'Is the plaintiff entitled to the use of the cotton gin and corn mill described in the complaint, under the provisions of the will of Mary E. Baird, as alleged in the complaint.' If you find by the greater weight of the evidence that the facts are as testified to by the witnesses, and as shown by the written and oral testimony, you will answer this issue Yes."

Upon the answer by the jury "Yes," judgment was rendered for plaintiff. Defendants assigned error and appealed to the Supreme Court.

John H. Taylor for plaintiff.
Julius Banzet for defendants.

CLARKSON, J. The sole question presented in this action: The owner of land placed in buildings on his land (1) a cotton gin, used for the purpose of ginning cotton for himself and the public; (2) a corn mill, used for the purpose of grinding corn for himself and the public, both run by the same boiler. Are they fixtures, and do they become part of the realty? We think so as between vendor and vendee.

It was in evidence that the gin and corn mill were in separate buildings, but run by the same boiler. The machinery was installed by J. J. Baird for the purpose not only of ginning his own cotton and grinding his own corn, but operated for the purpose also of ginning and grinding corn for other people. The gin and corn mill were installed prior to the deed of 10 April, 1917, from J. J. Baird to his wife, Mary E. Baird. The positive evidence was to this effect, although there was some negative uncertain evidence that the corn mill was installed a little later than the date of the deed, but its probative force was not sufficient to be submitted to the jury.

It will be noted the question of fixtures arises between vendor and vendee.

In *Potter v. Cromwell,* 40 N. Y., 287 (100 Am. Dec., p. 485), a portable grist mill was held to be a fixture and at execution sale went as part of the realty to the purchaser. *Daniels, J.,* at p. 297, said: "For it was annexed to the building erected upon the land, to be applied and appropriated to the business there to be carried on, with the design that it should be a permanent structure for use as a custom grist mill for the neighborhood existing about it."

In *McKenna v. Hammond,* 3 Hill Law, 331 (S. C.), (30 Am. Dec., 366), *Evans, J.,* said: "The principle upon which that case was decided, is, that whatsoever is erected upon land as a means of enjoying it, is a fixture; but whatever is intended for the purpose of carrying on a trade which has no necessary connection with the use of the land, is a mere chattel, and belongs to the administrator. And it was on the authority of the reasons of this case, that it was held in *Fairis v. Walker,* 1 Bail., 540, that a cotton gin was a fixture, and passed with the freehold." *DeGraffenreid v. Scruggs,* 4 Humphreys, 451 (Tenn.).

In *Richardson v. Borden,* 42 Miss., at p. 77, we find the following: "It seems to us, therefore, that it is clear from the authorities, here cited, as well as upon reason, that the gin-stand in this case, standing as gin-stands usually stand for use, being the only one on the place, and no reservation having been made at the time of sale or delivery of possession of the premises, was a fixture and passed with the title to the realty."

In *Latham v. Blakely,* 70 N. C., at p. 371-2, *Settle, J.,* speaking to the subject, said: "In answer to the suggestion that the gin was not sufficiently attached to the house to make it a part thereof, we observe that the later and better authorities pay more regard to the purposes which are to be served by the thing attached than to the manner of making the actual attachment. In South Carolina it is held that a cotton gin in its place, *i. e.,* connected with the running works in the gin house, is a fixture which passes to the purchaser of the house. *Bratton v. Clawson,* 2 Strobhart, 478. And this Court has held that planks laid down as an upper floor of a gin house, and used to spread cotton seed upon, though not nailed or otherwise fastened down than by their own weight, become a part of the gin house by being put in it for the purpose of being used with it, and the Court says, 'In that view it makes no difference whether they were nailed to the sleepers or not.' *Lawrence v. Bryan,* 5 Jones, 337 (50 N. C., 337)." *Bond v. Coke,* 71 N. C., 97; *Deal v. Palmer,* 72 N. C., 582; *Foote v. Gooch,* 96 N. C., 265; *Horne v. Smith,* 105 N. C., 322.

The case of *Overman v. Sasser,* 107 N. C., p. 432, is distinguishable from the present case. In that case the tenant by the curtesy put the cotton gin on the land. *Clark, J.,* distinguishes it from the cases above cited relative to vendor and vendee, says that the case comes under second class mentioned by *Lord Ellenborough* as follows: "Between executor of tenant for life, or in tail, and the remainderman, in which case the right of fixtures is considered more favorable for the executor." *Basnight v. Small,* 163 N. C., 15; *Pritchard v. Steamboat Co.,* 169 N. C., 457. See *Finance Co. v. Weaver, ante,* 178. In that case it is held that where personal property is sold under conditional sale contract, which is duly registered, does not become realty as against the conditional sale. On the record there is

No error.

W. A. BROWN, EXECUTOR OF ROSA L. BROWN, v. BARON B. BROWN.

(Filed 24 September, 1930.)

1. **Executors and Administrators D c—The law implies promise to pay funeral expenses and makes them preferred claim against estate.**

The obligation of the estate of a deceased to pay his funeral expenses is a preferential charge fixed by statute which implies a promise to pay for them. C. S., 93.

2. **Same—Husband and Wife B g—In absence of wife's agreement to be liable therefor her solvent husband is primarily liable for her funeral expenses.**

   The solvent husband of a deceased wife is primarily chargeable with the payment of her funeral expenses, and her separate estate is secondarily liable, and our statute permitting her to make an executory contract binding her separate estate does not change the common-law rule, although it gives her the power to make her estate primarily liable therefor by express agreement or intent to that effect.

3. **Same—In this case held: testamentary provision in will of wife charged her separate estate with primary liability for her funeral expenses.**

   Where a wife has executed a will which expresses her intent that her funeral expenses be paid out of her separate estate, the common-law rule that her husband is primarily liable therefor does not apply, and her separate estate is chargeable therewith, and where the solvent husband has paid them he may file and maintain a petition before the clerk of the court for the sale of her lands to make assets for their payment, the personal property being insufficient, and is entitled to be repaid from the proceeds the money he has thus advanced.

Appeal by defendant from *Midyette, J.*, at April Term, 1930, of Hertford.

W. A. Brown and Rosa L. Brown were husband and wife; the defendant, Baron B. Brown, is the son of Rosa and the step-son of W. A. Brown. Rosa L. Brown died leaving a last will and testament containing the following three items:

"1. My executor, hereinafter named, shall give to my body a decent burial, suitable to the wishes of my friends and relatives and pay all funeral expenses, together with all my just debts out of the first moneys which shall come into his hands belonging to my estate.

2. I give and devise to my beloved son, Baron B. Brown, in fee simple all my farm located in St. Johns Township, Hertford County, and bounded as follows (description follows).

4. It is my will and desire that my husband, W. A. Brown, shall have a lifetime estate in the entire farm which I have given to my son, Baron B. Brown, to use and occupy as he sees fit, receiving the rents and profits from same, and at his death to go to my son, Baron B. Brown."

The testatrix appointed her husband, W. A. Brown, the executor of her estate, and he filed a petition to sell the land described in the second and fourth items of the will to make assets for the payment of claims against her estate. Pleadings were filed and the cause was transferred to the Superior Court. It was admitted upon the hearing that the funeral expenses of Rosa L. Brown, testatrix, had been paid by W. A. Brown, her husband, who qualified as executor, and that he had not been reimbursed; that the funeral expenses are the only charge now outstanding against the estate; that the personal estate of the testatrix is insufficient to pay the amount of said funeral expenses, and that W. A. Brown, the husband, is solvent.

It is provided by statute that the assets must be applied in paying (1) debts of the decedent which have a specific lien on the property, and (2) funeral expenses, etc. C. S., 93.

The question is whether W. A. Brown has a legal right to recover from the estate of Rosa L. Brown the amount which he advanced for the payment of the funeral expenses. It was adjudged that the plaintiff is entitled to reimbursement and that the land be sold as requested in his petition to make assets for this purpose. The defendant excepted and appealed.

Alvin J. Eley for appellant.
C. W. Jones and D. C. Barnes for appellee.

ADAMS, J. At common law the husband was under obligation to supply the wife with such necessaries as, in view of his fortune, were reasonably suitable to her station in life, and in the event of her death to provide appropriate burial for her body and to pay all the funeral expenses. *Jenkins v. Tucker,* 126 Eng. Reports, 55, 4 C. P., 90; *Ambrose v. Kerrison,* 138 Eng. Reports, 307, 16 C. P., 776. This "last act of piety and charity" devolves upon him because "the law makes that a legal duty which the laws of nature and society make a moral duty." *Willes, J.,* in *Bradshaw v. Beard,* 142 Eng. Reports, 1175, 20 C. P., 344.

This doctrine is approved in a majority of the jurisdictions of this country and is founded either on the common law or on the view that local statutes do not abrogate the common-law rule. *Smyley v. Reese,* 53 Ala., 89, 25 A. R., 598; *Beverly v. Nance,* 224 S. W. (Ark.), 956; *In re Weringer's Estate,* 34 Pac. (Cal.), 825; *Brezzo v. Brangero,* 196 Pac. (Cal.), 87; *Gustin v. Bryden,* 205 Ill. App., 204; *Scott v. Carothers,* 47 N. E. (Ind.), 389; *Rocap v. Blackwell,* 137 N. E. (Ind.), 726; *Phillips v. Tribbey,* 141 N. E. (Ind.), 262; *Stonesifer v. Shriver,* 59 At. (Md.), 139; *Sullivan v. Horner,* 7 At. (N. J.), 411; *Kettener v. Nelson,* 37 L. R. A. (N. S.), (Ky.), 754; *Kenyon v. Brightwell,* 120 Ga., 606, 48 S. E., 124, 1 Ann. Cas., 169 and note; *Hall v. Stewart,* 135 Va., 384, 116 S. E., 469, 31 A. L. R., 1489, and annotation.

Many of the decisions enunciate the principle that the separate estate of the wife is not liable for funeral expenses. It was so held in *Bowen v. Daugherty,* 168 N. C., 242, although as therein stated courts of eminent ability and learning have held that by reason of local statutes the estate of the deceased wife is primarily liable. In that case it was shown that the wife died intestate seized of a tract of land, but not leaving sufficient personal property to pay the claims against her estate.

G. W. Bowen qualified as her administrator and filed a petition to sell the land to pay claims, including funeral and burial expenses. The accounts against her estate were made after the adoption of the act giving married women the right to contract. Soon after her death her husband died, leaving enough property to pay these claims and all debts against his own estate. The trial court adjudged that the estate of the deceased wife was liable and that the land should be sold. On appeal the judgment was reversed.

After saying that the husband is liable for the funeral expenses and "necessaries" furnished the wife during their married life, the Court, in elucidation of its position, held that a married woman in proper instances may now be liable on the common counts in assumpsit; but in the absence of a promise and of any evidence tending to show that credit was given to her, or of any facts and circumstances to make her exclusively or primarily liable under the general equitable principles of *indebitatus assumpsit,* there was no reason why a debt of the husband should be imputed to the wife. It was suggested that if the husband should fail to pay reasonable funeral charges, or his estate should be insolvent, an equity might arise in behalf of a creditor enabling him to collect from the wife's estate—this on the ground of necessity, or on the principle that a parent who is unable to support his child may charge the child's estate with maintenance. *Smyley v. Reese, supra; Nashville Trust Co. v. Carr,* 62 S. W. (Tenn.), 204; *Kenyon v. Brightwell, supra.*

Funeral expenses are not technically a debt, but a charge upon the estate of the deceased. *Gregory v. Hooker,* 8 N. C., 394; *Parker v. Lewis,* 13 N. C., 21; *Ward v. Jones,* 44 N. C., 127; *Ray v. Honeycutt,* 119 N. C., 510. In the case last cited it is said that the necessary and proper expenses of interment are a first charge upon the assets in the hands of the personal representative, and that the law will imply a promise to him who, from the necessity of the case, for any reason incurs the expense of a proper burial. But it is obvious, as held in *Bowen v. Daugherty, supra,* that this principle is not intended to bind the estate of a deceased wife who died intestate, in exoneration of her surviving husband who is solvent.

It is said in the concurring opinion of *Chief Justice Clark* in *Bowen v. Daugherty* that the wife is not made responsible for articles bought for her support unless by her contract or conduct she leads the seller reasonably to understand that she assumes individual responsibility; and even then that the husband would remain liable and the seller could recover against either or both. The law which confers upon married women the capacity to make contracts, and to deal with their property as if they were unmarried has not abrogated the husband's common-law liability for "necessaries" furnished his wife. His responsibility for the funeral expenses of his deceased wife rests upon the principle which makes him liable for her maintenance while she is living *(Smyley v. Reese, supra)*; and his liability is ordinarily primary unless he is relieved therefrom by some contractual or testamentary provision. *Phillips v. Tribbey, supra.*

But in the present case is not the husband relieved of primary liability by the testamentary provision of his deceased wife? In the second item of her will she expressly charged her separate estate with the payment of "all funeral expenses." She had legal capacity to do so. *Lipinsky v. Revell,* 167 N. C., 508. In *Bowen's case* it is said that as a rule neither a wife nor her estate is liable for the payment of a debt contracted for "necessaries" furnished her, or for funeral expenses; but that her express promise is one of the modes by which she and her estate may be bound. The promise or charge upon her property may be by testament. In 1856 the point was considered by the English Court of Chancery in *Willeter v. Dobie,* 2 Kay & Johnson, 647. There the wife had charged her funeral expenses on the residue of her separate estate, and it was held that her husband, who had paid the expenses, was entitled to reimbursement out of the residue. Substantially the same principle is approved in *McClellan v. Filson,* 44 Ohio St., 184; *Babbitt v. Morrison,* 58 N. H., 419; *Gustin v. Boyden, supra; Kenyon v. Brightwell, supra; Rocap v. Blackwell, supra.* The logical effect of the wife's testamentary charge upon her separate property is to impose ultimate liability upon her estate rather than upon the surviving husband. *Willeter v. Dobie, supra; Wheeler's Estate,* 4 Pa. Dist. R., 265; *Jackson v. Westerfield,* 61 How. Pr., 399; *Re Stadtmuller,* 110 App. Div., 76, 96 N. Y., Supp., 1101.

If a married woman dies intestate her estate is chargeable with funeral expenses only in such exceptional instances as were pointed out in *Bowen v. Daugherty;* but if she makes a will charging her estate with the payment, the burden thus imposed becomes the primary liability.

The plaintiff is entitled to reimbursement.

Judgment affirmed.

H. G. McNEILL v. A. R. SUGGS.

(Filed 24 September, 1930.)

1. Usury A a—Usury is knowingly taking or receiving greater rate of interest than six per cent.

Usury is the taking, receiving or charging a greater rate of interest than six per cent, either before or after the interest may accrue, when knowingly done, and it works a forfeiture of the interest and when the unlawful interest has been paid the debtor may recover twice the amount so paid in an action in a court of competent jurisdiction. C. S., 2306.

2. **Limitation of Actions E c—Statute must be pleaded when relied on as defense to action to recover penalty for usury.**

In an action to recover the statutory penalty for usury the two-year statute of limitations must be pleaded when relied on as a defense, the clause relating thereto having been taken out of section 3836 of The Code and placed in the chapter relating to civil procedure, C. S., 442, and thereby made a statute of limitations, but when properly pleaded the burden is upon the plaintiff to prove that his suit is brought within two years from the time the cause of action accrued.

3. **Appeal and Error K a—Where findings of fact are not sufficiently definite to apply law relating thereto the case will be remanded.**

Where in an action to recover the statutory penalty for usury the two-year statute of limitation is pleaded in bar of recovery, and the case is referred to a referee, the defendant is entitled to a specific finding of fact in regard to the date of the transactions so that the law in regard to the plea of the statute can be applied to the facts, and where the findings of fact are not sufficiently definite on this point the case will be remanded for additional facts, which in this case may be found by the trial court without the necessity of another reference.

Appeal by defendant from *Lyon, Emergency Judge,* at April Term, 1930, of Harnett. Error.

This is an action for the recovery of usury—double an alleged excessive rate of interest paid by the plaintiff to the defendant.

The plaintiff filed a complaint, an amended complaint, and an amendment to the amended complaint, and to each of these the defendant filed an answer, denying that he was indebted to the plaintiff or that he had collected an excessive rate of interest, and pleading the statute of limitations. The transactions began in December, 1920, and continued for several years.

The cause was referred, and on 31 January, 1930, the referee made the following report:

1. All causes of action except the transaction involving the note for $3,000 dated 20 May, 1922, occurred more than two years prior to the commencement of the suit.

2. On 20 May, 1922, the plaintiff gave the defendant a note for $3,000, which note was secured by a chattel mortgage. The consideration for this note was a balance due to the defendant by plaintiff and $1,600 paid to the plaintiff by defendant.

3. The note set forth as a counterclaim or cross-action by the defendant against the plaintiff, which note was dated 1 November, 1918, for $459 was included in settlements made between plaintiff and defendant prior to 20 May, 1922.

4. On 20 May, 1922, when the $3,000 note was given, this, in addition to the amount paid at that time by the defendant to the plaintiff, settled all matters up to that date.

5. Payments were made from time to time on this $3,000 note, and a final settlement was made between the parties through Caviness Brown, Esq., and he calculated the interest and fixed the amounts due by plaintiff to the defendant. When this settlement was made, it settled all matters between plaintiff and defendant up to that period.

6. Testimony as to payments and dates of payments were rather confusing, but the referee finds that the defendant charged and received against the plaintiff ten per cent on this $3,000 loan, and when settlement was made, such settlement was calculated on a basis of ten per cent.

7. Interest was charged on the $3,000 note until it was paid and from the payments made the referee finds that the interest paid on said note was certainly as much as $300, and that this interest was usurious interest in that it was in excess of six per cent, and was knowingly charged and received by the defendant.

CONCLUSIONS OF LAW.

The referee therefore concludes as a matter of law:

1. That the plaintiff is entitled to recover of the defendant the sum of $600, this being twice the amount of interest paid.

2. The referee further finds that the plaintiff is not indebted to the defendant on the counterclaim set forth in the answer.

The defendant filed exceptions, which were overruled. Judgment for plaintiff in the sum of $600; appeal by defendant upon assigned error.

Hoyle & Hoyle for appellant.

Young & Young, W. P. Byrd and J. R. Baggett for appellee.

ADAMS, J. Taking, receiving, reserving, or charging a greater rate of interest than six per cent, either before or after the interest may accrue, when knowingly done, works a forfeiture of the whole interest; and if a person pays an unlawful rate of interest, he or his legal representative may, by suit in a court of competent jurisdiction, recover twice the amount of interest paid. C. S., 2306; *Ragan v. Stephens,* 178 N. C., 101.

The statute (C. S., 2306), formerly contained a proviso that an action to enforce the penalty should be commenced within two years from the time the usurious-transaction occurred (The Code, 3836); and it was held that a defendant was entitled to the protection of this clause, although it was not pleaded. *Roberts v. Ins. Co.,* 118 N. C., 429, 435; *Tayloe v. Parker,* 137 N. C., 418. But the clause was subsequently taken out of section 3836 of The Code and transferred to the chapter in Civil Procedure prescribing the limitation of actions. Revisal, sec. 396; C. S., sec. 442. It was thereby made a statute of limitations. This is pointed out in *Burnett v. R. R.,* 163 N. C., 186, 193, the reversal by the Supreme Court of the United States not affecting the decision of this question. *R. R. v. Burnett,* 239 U. S., 199, 60 Law Ed., 226.

The objection that the action was not brought within the time limited was specifically pleaded. C. S., 405. This plea imposed upon the plaintiff the burden of showing that his suit was brought within two years from the time his cause of action accrued. *Tillery v. Lumber Co.,* 172 N. C., 296. In the amendment to his amended complaint, which was filed on 23 August, 1929, he alleged that on 20 May, 1922, he executed and delivered to the defendant his note in the sum of $3,000, together with a deed of trust as security.

It is contended by the defendant that the last transactions in reference to the note for $3,000 took place on 17 November, 1924; that the amendment constitutes a new cause of action; and that, as more than two years intervened between the last communication of the parties and the filing of the last amendment, the plaintiff's cause is barred. The plaintiff says that the amendment is merely an amplification of allegations in his previous pleadings; that the summons was issued on 21 February, 1925, and that his action is not barred.

It would be a doubtful undertaking if we should try to determine these contentions upon the face of the record. Of course we have no access to the evidence, and in the plaintiff's pleadings the references to the note of $3,000 are not sufficiently definite to enable us to hold as a conclusion of law that the loan of $3,000 referred to in the thirteenth and fourteenth paragraphs of the amended complaint is embraced in the note set out in the amendment to the amended complaint.

The referee's report is indefinite as to the statute of limitations. It contains a finding of fact that all causes are barred except the one involving the note of $3,000. If the finding raises an inference that the latter is not barred it is defective, because no dates are fixed upon which the law can be declared. The defendant is entitled to a specific finding of the facts upon his contentions, so that it may be decided whether upon the facts as found the plaintiff's action is barred. The cause is therefore remanded for additional facts, which we presume may be ascertained by the court without the necessity of another reference.

Error and remanded.

STATE v. HARVEY LAWRENCE.

(Filed 24 September, 1930.)

1. **Criminal Law I c—Mere presence of guards during trial does not prejudice defendant and is not ground for new trial.**

   The mere fact that the officers of the court guarded the outside of the court-room with State militia during the course of the prisoner's trial in a criminal prosecution, for the prisoner's protection, does not alone entitle the prisoner to a new trial on appeal upon the ground that a fair and impartial trial, guaranteed by the Constitution, had not been given him, where it appears that no demonstration had been made against him or anything done that could have prejudiced his rights, and his exception to the refusal of the trial court to allow his motion that the guard be dismissed will not be sustained on appeal, ordinarily matters of this kind being within the sound discretion of the court.

2. **Criminal Law L g—Supreme Court is confined to matters of law or legal inference on appeal in criminal cases.**

   The Supreme Court is confined to matters of law or legal inference upon an appeal in a criminal prosecution. Article IV, section 8.

3. **Criminal Law B a—In this case held: question of whether defendant was too intoxicated to have criminal intent was for jury.**

   Where the prisoner on trial for a capital felony relies upon his evidence tending to show that he was too intoxicated at the time of the commission of the crime to have a criminal intent, and there is evidence to the contrary offered by the State, the conflicting evidence raises an issue of fact for the determination of the jury under proper instructions from the court.

4. **Criminal Law L d—Where instructions do not appear of record they will be deemed to be without error.**

   Where the charge of the trial court to the jury does not appear of record on appeal it will be conclusively presumed that the court correctly charged the law arising upon the evidence.

Appeal by defendant from *Midyette, J.*, at April Special Term, 1930, of Hertford. No error.

At his trial on an indictment for burglary, the defendant in this action was convicted of burglary in the first degree. C. S., 4232. From judgment that he suffer death by means of electrocution, as prescribed by statute, C. S., 4233, defendant appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

A. T. Castelloe and V. D. Strickland for defendant.

Connor, J. On his appeal to this Court the defendant contends that if the judgment from which he has appealed is affirmed, and executed as required by statute, he will be deprived of his life, without due process of law, for that the trial at which he was convicted and sentenced to death, was conducted under such conditions that it was not a fair and impartial trial according to the law of the land. Upon this contention, defendant prays that a new trial be granted him by this Court.

It appears from the statement of the case on appeal in the record, that there was present during the trial in the Superior Court a guard consisting of twenty-eight armed members of the State militia. This guard was present for the purpose of protecting the defendant during the trial from apprehended violence and of assuring the defendant a fair and impartial trial. There is nothing in the record tending to show the ground of such apprehension. There was no manifestation, either before or at the trial, of any ill-will toward the defendant on the part of citizens of Hertford County, or of any purpose on their part to prevent or interfere with an orderly trial, by violence or otherwise. The guard was doubtless provided because it was apprehended by the sheriff of Hertford County and others whose duty it was to protect the defendant, and assure him a fair and impartial trial, that, because of the nature of the crime with which the defendant was charged, there might be some outburst of feeling against the defendant on the part of those who should attend the trial, followed by some attempt to do him harm. Fortunately, there was no such outburst. The presence of the guard in the court-house yard and the jail nearby did not prejudice the defendant. The learned and experienced judge who presided at the trial, at the request of counsel for defendant, excluded the members of the guard from the court-room during the trial. His denial of defendant's motion that the guard be dismissed and sent away, was not error for which defendant is entitled to a new trial. This motion was addressed to his discretion, and his ruling, in the absence of a palpable abuse of such discretion, cannot be reviewed by this Court. As was said in *Rawls v. Lupton,* 193 N. C., 428, 137 S. E., 175, "We have no power here except to review upon appeal decisions of the courts below upon matters of law or legal inference." Const. of N. C., Art. IV, sec. 8.

We cannot hold that where as in the instant case the executive officers of the State have provided an armed guard for the protection of a defendant in a criminal action, during his trial, from apprehended violence or from manifestations, during the trial, on the part of those present, of ill-will toward the defendant, the mere presence of the guard at the trial deprives the defendant of a fair and impartial trial—such as he is entitled to under the laws of this State. Ordinarily, matters of this kind are within the discretion of the presiding judge, whose duty it is to see that conditions surrounding the trial are not prejudicial to the defendant. *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187.

It is not contended on this appeal that the evidence offered at the trial by the State was not sufficient to support the verdict that defendant is guilty of burglary in the first degree as charged in the indictment; nor is it contended that evidence offered by the State was submitted to the jury over the objection of defendant, or that evidence offered by the defendant was excluded upon objection by the State. The evidence set out in the case on appeal, admittedly competent in all respects, was amply sufficient to sustain the verdict.

The defendant for his defense relied upon evidence offered by him tending to show that he was so intoxicated, as a result of drinking whiskey, at the time the evidence offered by the State tended to show that he broke and entered the dwelling-house as charged in the indictment, that he was incapable of forming the unlawful intent charged, which was an essential element of the crime. *S. v. Allen,* 186 N. C., 302, 119 S. E., 504. There was evidence, however, offered by the State, tending to show that defendant was not intoxicated, as he contended, and that he was not under the influence of whiskey at the time the crime was committed. As there was no exception to the charge of the court to the jury—the charge not appearing in the case on appeal prepared by counsel for defendant, and accepted by the solicitor for the State—it must be conclusively presumed that the conflicting evidence was properly submitted to the jury under correct instructions as to the law applicable to the facts as the jury should find them from the evidence.

Where the charge of the court to the jury is not included in the case on appeal certified to this Court, it is presumed that it was not prejudicial to the appellant. *S. v. Sigmon,* 190 N. C., 684, 130 S. E., 854; *S. v. Carivey,* 190 N. C., 319, 129 S. E., 802; *In re Westfeldt's Will,* 188 N. C., 702, 125 S. E., 531; *Indemnity Co. v. Tanning Co.,* 187 N. C., 190, 121 S. E., 468; *Bank v. Wysong,* 177 N. C., 284, 98 S. E., 769; *Ellison v. Telegraph Co.,* 163 N. C., 5, 79 S. E., 277.

Defendant's only assignment of error on his appeal to this Court is based upon his exception to the refusal of the court to allow his motion that the guard, provided for the protection of defendant during his trial, be dismissed. This assignment of error cannot be sustained. We find no error on the record. The judgment is, therefore, affirmed.

No error.

ERNEST BRAXTON v. J. T. MATTHEWS.

(Filed 24 September, 1930.)

Execution K a—Evidence in this case held sufficient for submission of issue as to defendant's wilful or wanton infliction of injury.

Although negligence alone in the infliction of a personal injury is not sufficient to support an execution against the person of the defendant, intent to inflict the injury may be constructive, and where the acts of the defendant are so reckless or indifferent to the safety of life or limb as to amount to wilfulness or wantonness, they are equivalent in spirit to actual intent, and, *Held*, the evidence in this case tending to show that the defendant and his driver, while intoxicated, operated defendant's car recklessly and wilfully, was sufficient to warrant the submission of the issue and sustain an affirmative answer thereto.

APPEAL by defendant from *Small, J.*, at August Term, 1930, of PITT. No error.

Albion Dunn for plaintiff.
Julius Brown for defendant.

PER CURIAM. This is an action to recover damages to the plaintiff's person and property resulting from a collision of automobiles alleged to have been caused by the negligence of the defendant. The verdict was favorable to the plaintiff, and from the judgment rendered the defendant appealed on exceptions appearing in the record.

There was evidence tending to show that the defendant owned the car, and that he and his driver operated it recklessly and wilfully while they were under the influence of intoxicating liquor.

All matters involved in the exceptions have heretofore been resolved against the defendant's contentions. Of course an execution against the person would not be allowed upon a mere finding of negligence, but as is said in *Oakley v. Lasater,* 172 N. C., 96, only when the injury has been inflicted intentionally or maliciously—*i. e.,* when there is an element of fraud, or violence, or wantonness and wilfulness, or criminality. C. S., 768; *Coble v. Medley,* 186 N. C., 479; *Foster v. Hyman,* 197 N. C., 189. In the last case after a definition of wilfulness and wantonness this language appears: "A breach of duty may be wanton and wilful while the act is yet negligent; the idea of negligence is eliminated only when the injury or damage is intentional. *Ballew v. R. R.,* 186 N. C., 704, 706. In *Foot v. R. R.,* 142 N. C., 52, in which the jury found in response to separate issues that the plaintiff had been injured by the wanton and wilful negligence of the defendant, distinction was noted between the wilfulness which is referred to a breach of duty and wilfulness which is referred to the injury; in the former there is wilful negligence and in the latter intentional injury. But as stated in *Ballew v. R. R., supra,* the intent to inflict the injury may be constructive as well as actual. It is constructive where the wrongdoer's conduct is so reckless or so manifestly indifferent to the consequences, where the safety of life or limb is involved, as to justify a finding of wilfulness and wantonness equivalent in spirit to actual intent."

The application of these principles by appropriate instructions was ample justification for the answer to the third issue relating to the defendant's condition and his reckless and wanton conduct. *S. v. Trott,* 190 N. C., 674.

The other exceptions disclose no reversible error.

No error.

COUNTY OF CARTERET v. SIMMONS CONSTRUCTION CORPORATION ET AL.

(Filed 24 September, 1930.)

Pleadings F a—Motion for bill of particulars is addressed to sound discretion of trial court.

A motion for a bill of particulars is addressed to the inherent general power of the trial court to regulate the conduct of trials, and when fairly exercised is not appealable.

APPEAL by defendants from *Nunn, J.,* at March Term, 1930, of CARTERET.

Civil action for damages.

Motion by defendants for bill of particulars; allowed in part and denied in part.

Defendants appeal, assigning errors.

E. H. Gorham, Guion & Guion and McLendon & Hedrick for plaintiff.

Moore & Dunn and J. F. Duncan for Simmons Construction Corporation and Floyd M. Simmons.

J. F. Duncan, C. R. Wheatly and Luther Hamilton for G. W. Huntley and George Brooks.

C. R. Wheatly and Ward & Ward for C. K. Howe and W. L. Stancil. defendants.

PER CURIAM. The record discloses no action on the part of the trial court of which the defendants can justly complain.

The pertinent rule is stated in 49 C. J., 625, as follows:

"It is a matter for the sound discretion of the court whether under the circumstances of the case a demand for a bill of particulars should be granted or refused. This power of the court exists by virtue of its general power to regulate the conduct of trials, and it is incident to its general authority in the administration of justice. It is the same power in kind that courts have to grant a new trial on the ground of surprise."

Our own decisions are to the same effect: *Power Co. v. Elizabeth City,* 188 N. C., 278, 124 S. E., 611; *Townsend v. Williams,* 117 N. C., 330, 23 S. E., 461.

Affirmed.

IN RE PETITION OF EMILY M. PEADEN AND MAGGIE L. CLARK.

(Filed 1 October, 1930.)

1. **Gifts A c—In this case held: transaction operated as absolute gift which could not be subsequently affected by donor.**

   Where the grantor in a deed reserves a life estate to himself and conveys the remainder in fee to his son upon condition that at the grantor's death, or sooner at the grantee's option, the grantee pay to the two daughters and one granddaughter of the grantor the sum of five hundred dollars each, and the deed is registered and accepted by the grantee: *Held,* the condition for the payment of the stipulated sum operates as an absolute gift to the daughters and granddaughter which may not be revoked by the grantor, and upon the death of the granddaughter intestate during the lifetime of the grantor he may not dispose of her share by will, which should be paid to her administrator for distribution according to the canons of descent.

2. **Descent and Distribution B d—In this case held: father of deceased child was entitled to inherit from such child under canons of descent.**

   Where an intestate dies leaving her surviving her father, and has no husband, brothers or sisters, or issue of brothers or sisters, her father is entitled to distribution under the canons of descent. C. S., 137, subsection 6.

3. **Deeds and Conveyances C f—Grantee accepting deed is bound by its conditions.**

   Where a deed to lands is conditioned upon the payment by the grantee of a stipulated sum in the future to persons designated by the grantor, upon acceptance of the deed by the grantee he is bound to the performance of the condition.

4. **Appeal and Error K a—In this case administration of estate is necessary and case is modified and affirmed.**

   The Supreme Court will take judicial notice on appeal of the lack of administration of an estate, necessary to the determination of the case, and where the record discloses such deficiency the judgment will be remanded in order that the defect be remedied.

APPEAL by petitioners, Emily M. Peaden and Maggie L. Clark, from *Barnhill, J.*, at May Term, 1930, of PITT. Modified and affirmed.

On 22 December, 1909, H. J. Smith and wife, Arrena Smith, made and executed a deed to Jesse S. Smith and his heirs and assigns, to a certain tract of land in Pitt County, N. C., describing it, containing 64.8 acres. The following is in the deed: "Witnesseth, that said H. J. Smith and Arrena Smith, his wife, in consideration of one dollar, to them paid by the said Jesse S. Smith, the receipt of which is hereby acknowledged, and for the further consideration of fifteen hundred dollars to be paid as hereinafter stated, have bargained and sold, and by these presents do bargain, sell and convey to said Jesse S. Smith and his heirs," etc. Then the land is described by metes and bounds. "The said H. J. Smith and wife, Arrena Smith, hereby excepts and reserves their life estate, in all the above-described land except that portion heretofore deeded and conveyed to said Jesse S. Smith, and it is further understood and agreed between said parties, that in order to make this deed effectual and binding, the said Jesse S. Smith is to pay at the death of said H. J. Smith and Arrena Smith (or sooner if he desires to do so), the sum of fifteen hundred dollars, as follows: To our daughter, Emily M. Peyton, the sum of $500; to our daughter, Maggie L. Clark, the sum of $500; to our granddaughter, Lucy Elks, the sum of $500." Then follows the habendum clause, etc.

The deed was duly signed, acknowledged and recorded in the register of deeds office for Pitt County, N. C. The granddaughter, Lucy Elks, mentioned in the deed, died intestate prior to the death of the said H. J. Smith and Arrena Smith, leaving surviving her father, James W. Elks, the respondent in this proceeding. Arrena Smith died before her husband, H. J. Smith. The said H. J. Smith died, leaving a last will and testament, in which appears the following: "First, I have already deeded to Jesse S. Smith my home place of 46 acres, more or less, valued at $4,700, and coming in possession at my death, he shall pay to my daughter, Emily M. Peaden, $750, and to my daughter, Maggie L. Clark, $750, total $1,500 to be payable by Jesse S. Smith. I will and bequeath to my daughters, Emily M. Peaden and Maggie L. Clark, all my personal property of every description, including money that might be on hand at my death equal between the two, Maggie L. Clark and Emily M. Peaden."

The following judgment was rendered by the court below: "This cause coming on to be heard at the May Term, 1930, of Pitt County Superior Court, before his Honor, M. V. Barnhill, judge presiding, and being heard upon an appeal from former judgment of the clerk of the Superior Court of Pitt County, and being heard upon the petition of Mrs. Emily M. Peaden and Mrs. Maggie L. Clark, and the answer of James

W. Elks, and after argument by counsel, it appearing to the court that the judgment entered by J. F. Harrington, clerk of the Superior Court, should be sustained and that James W. Elks is the owner and entitled to the sum of $500, now deposited in the office of the clerk of the Superior Court: It is therefore, upon motion of F. G. James & Son, attorneys for James W. Elks, ordered, adjudged and decreed that James W. Elks is the owner and entitled to the sum of $500, so deposited, and the clerk of the Superior Court of Pitt County is authorized, empowered and directed to pay over said amount to James W. Elks. It is further ordered that the costs of this proceeding be paid by the petitioners."

L. W. Gaylord and Albion Dunn for petitioners, Emily M. Peaden and Maggie L. Clark.

F. G. James & Son for James W. Elks, respondent.

CLARKSON, J. The question involved: Was the provision in the H. J. Smith deed that the grantee was to pay, upon the death of the grantor (or sooner if he desires to do so), the sum of $500 to Lucy Elks (and the petitioners, Emily M. Peaden and Maggie L. Clark) an absolute gift, or was the same subject at all times to the control of the grantor, prior to its actual payment? We think it was an absolute gift—the language of the deed clearly shows it was intended as such.

It is well settled that the acceptance of a deed by a grantee renders him liable to pay the consideration. *Peel v. Peel,* 196 N. C., 782. This is not disputed on the record by Jesse S. Smith, who admits that he is liable for the amount he agreed to pay for the land, and has deposited the $500 with the clerk of the court of Pitt County. The question is to whom should it be paid? Under the deed, "It is further understood and agreed between the said parties" that he pay "to our daughter, Emily M. Peaden, the sum of $500; to our daughter, Maggie L. Clark, the sum of $500; to our granddaughter, Lucy Elks, the sum of $500." Lucy Elks died intestate and left her father, James W. Elks, surviving her.

C. S., 137, subsection 6, is as follows: "If in the lifetime of its father and mother, a child dies, intestate, without leaving husband, wife or child, or the issue of a child, its estate shall be equally divided between the father and mother. If one of the parents is dead at the time of the death of the child, the surviving parent shall be entitled to the whole of the estate. The term 'father' and 'mother' shall not apply to stepparent, but shall apply to a parent by adoption: *Provided,* that a parent, or parents, who has wilfully abandoned the care, custody, nurture and maintenance of such child to its kindred, relative or other person, shall forfeit all and every right to participate in any part of said child's estate under the provisions of this section."

We think the will made by H. J. Smith inoperative, so far as the subject of this action is concerned. The grantor H. J. Smith agreed with the grantee to sell him the land for $1,500, and it was understood and agreed between the parties that the $1,500 was to be paid $500 to each of the two daughters and $500 to the granddaughter. We think this is an irrevocable gift to the daughters and granddaughter.

In 28 C. J., p. 672, part sec. 74(4) is the following: "Close relationship between the parties, such as husband and wife, parent and child, and the like, creates a presumption that a delivery of property from one to the other, without explanatory words, was intended as a gift, and such presumption is strengthened by proof that the donor on previous occasions had made similar gifts. The rule does not apply to transactions between brother and sister, they being regarded as strangers. This presumption, however, does not arise unless there is a delivery of the property, or unless, in case of a gift of land, it is followed by actual and unequivocal possession and improvement." Section 75(5): "The acceptance of a gift, beneficial to the donee and otherwise complete, will be presumed, unless the contrary is made to appear, even though the donee did not know of the gift at the time it was made. The rule is especially applicable where the donee is laboring under some disability. Thus, where a gift made to an infant is beneficial, and not burdensome, the law will presume acceptance, or, as some courts say, 'the law accepts it for him.'" *Harrell v. Tripp,* 197 N. C., 426.

It is not necessary in this case to rely on any presumption, the unequivocal language of the deed makes it a gift, which the grantee in the deed agreed to pay to the respective parties.

It may be noted that the record discloses that there is no administration on the estate of the granddaughter, Lucy Elks. No question has been raised as to this, by the petitioners, appellants, but the court will take judicial notice of the defect. There must be an administration on her estate. Therefore, the judgment is

Modified and affirmed.

C. L. WILLIAMS, SOLICITOR OF FOURTH NORTH CAROLINA JUDICIAL DISTRICT, ON RELATION OF THE STATE OF NORTH CAROLINA, v. JOHN B. HOOKS ET AL.

(Filed 1 October, 1930.)

1. **Clerks of Court B a—Statute does not require clerk to invest funds paid into his hands for minor under C. S., 148.**

Where funds belonging to a minor are paid into the hands of the clerk of the Superior Court by an administrator under the provisions of C. S., 148, discharging the administrator and his sureties from liability in regard thereto, it is not required by statute, C. S., 153, 956, that the clerk invest the funds, upon interest, unless so directed, the clerk being liable for such funds as an insurer, and the clerk and his sureties are not liable for the amount of interest the funds would have drawn if they had been so invested, but if the funds are actually invested by the clerk he is liable for the interest actually received therefrom, since a fiduciary will not be allowed to make a personal profit out of funds committed to his custody.

2. **Appeal and Error K a—Where findings of fact are not sufficient for determination of cause the case will be remanded.**

Where on appeal there is no agreed statement of fact or finding as to whether a deceased clerk of court invested and received interest, for which his estate must account, on a sum paid into his hands under the provisions of C. S., 148, the case will be remanded for a specific finding in regard thereto.

CIVIL ACTION, before *Sinclair, J.*, at April Term, 1930, of WAYNE.

Prior to 1920, John B. Hooks was clerk of the Superior Court of Wayne County and died in office on 28 November, 1929. The defendant, Goldsboro Savings and Trust Company, was appointed receiver of the estate of said clerk in December, 1929. On 16 February, 1920, Clara G. Hill, administratrix of the estate of William L. Hill, paid to John B. Hooks, clerk of the Superior Court of Wayne County, the sum of $2,730.85 for the use of the minor children of the said William L. Hill, deceased. The agreed facts show that "said funds were commingled by the said John B. Hooks, clerk of the Superior Court, with other funds in his office in such manner that it was impossible to identify such funds or any notes or securities in which the same were invested; that the property of the estate of John B. Hooks, clerk of the Superior Court of Wayne County, consisted principally of certificates of deposit, which bore interest at the rate of four per cent per annum and mortgage notes which bore interest at the rate of six per cent per annum; that a considerable portion of the notes held by John B. Hooks, clerk of the Superior Court of Wayne County, are worthless and uncollectible, and that it is impossible at this time to determine the exact amount of the same; that there is no circumstance or evidence to show that any of the worthless notes represented investments of the fund above referred to and no circumstance or evidence to show that John B. Hooks was negligent in investing any of the funds of his estate in said notes which are now worthless."

The record further tends to show that from time to time the said clerk duly paid to said minors the sum of $2,154.10, leaving a balance due of $576.75. The claimants contend that this balance of $576.75 should bear interest from the date it was paid into the clerk's hands, and this interest added to the principal sum due would make a total of $1,695.68. The trial judge allowed the claim to the amount of the principal, to wit, $576.75, but declined to allow interest, "the court finding as a fact and concluding as a matter of law that the receiver is not obligated to pay the said Otis Hill and others any interest on the funds held by J. B. Hooks, C. S. C., for said Otis Hill and others."

From the foregoing judgment claimants appealed.

R. H. Taylor for claimants.
Kenneth C. Royall and J. N. Smith for receiver.

BROGDEN, J. Is a clerk of the Superior Court liable for interest upon funds paid to him in his official capacity for the use of minors?

The pertinent statutes relating to the subject under discussion are C. S., 148, 153, and 956. C. S., 148, authorizes an administrator or executor to pay into the office of the clerk of the Superior Court any moneys belonging to the legatees or distributees of the estate, and such payment shall operate as a discharge of such administrator or executor and his sureties, to the extent of the amount so paid. It is apparent that this statute was enacted primarily for the relief of executors, administrators and collectors. C. S., 153, authorizes an executor or administrator to file a petition for settlement with an infant or absent defendant and to pay into court the funds in his hands, such funds "to be invested upon interest or otherwise managed under direction of the judge for the use of such absent person or infant." Hence, funds paid into court in pursuance of this statute must be invested "upon interest" if so directed, and if not invested "upon interest" to be "otherwise managed under the direction of the judge," etc.

C. S., 956, requires the clerk of the Superior Court to submit an official report to the county commissioners on the first Monday in December "of all public funds which may be in his hands." Such report "shall give an itemized statement of said funds so held, the date and source upon which they were received, the person to whom due, how invested and where, in whose name deposited, the date of any certificate of deposit, the rate of interest the same is drawing, and other evidence of investment of said funds." Obviously the quoted portion of the statute contemplates the investment of public funds although such investment does not seem to be mandatory. Said section further provides that the report of the clerk "shall include a statement of all funds in their hands by virtue or color of their office." It is to be observed that the latter clause of the section does not mention interest or investment.

It is manifest that there is no mandatory requirement of law, imposing upon the clerk of the Superior Court, the express duty of investing funds in his hands belonging to minors. Clerks of Superior Courts frequently hold substantial sums of money belonging to minors for long periods of time, and it is a hardship that a person under disability should be compelled to have his money lie idle, when, by the exercise of sound business prudence and close scrutiny of security required for the protection of the investment, the fund could be materially augmented. Upon the other hand, "it is settled in this State that the bond of a public officer is liable for money that comes into his hands as an insurer and not merely for the exercise of good faith." *S. v. Ehringhaus,* 30 N. C., 7; *Presson v. Boone,* 108 N. C., 79, 12 S. E., 897; *Smith v. Patton,* 131 N. C., 396, 42 S. E., 849; *Gilmore v. Walker,* 195 N. C., 460, 142 S. E., 579, 59 A. L. R., 53. Thus, if the clerk makes an investment in the utmost good faith and in the exercise of sound business judgment, and the investment fails, he is still responsible for the money and must pay it to the person entitled thereto. If he deposits the money in a bank of known and approved solvency and the bank thereafter fails, he must suffer the loss, because if he fails to pay upon demand the law presumes that he misappropriated the fund at the very instant it came into his hands.

In the case at bar, notwithstanding the silence of the law upon the question of interest, it is contended by the claimants that as a matter of fact the clerk invested the funds and collected interest thereon either by means of certificates of deposit or loans upon real estate. If such be the fact, the clerk would be liable for the interest he received, for it is now a truism of the law that no fiduciary can make a personal profit out of funds committed to his custody. There is no agreed statement of fact with reference to this question and no finding by the trial judge. Therefore, the cause is remanded to the Superior Court of Wayne County for a specific finding as to whether the clerk actually received interest upon the fund in controversy, and, if so, the amount thereof. If the deceased clerk did not receive interest upon the fund in controversy, the judgment rendered is correct. If he did receive interest thereon, his estate must account to the claimants for the proper amount thereof.

Remanded.

THE TEXAS COMPANY v. THE BEAUFORT OIL AND FUEL COMPANY.

(Filed 1 October, 1930.)

1. **Appeal and Error C b—Certified statement of case on appeal will stand when appellee fails to serve countercase or exceptions.**

   Where the appellant prepares his statement of case on appeal and service thereof is accepted by the appellee within the time allowed by the judge, and is certified by the clerk as a part of the record, in the absence of service of exceptions or countercase it is deemed approved by the appellee, C. S., 643, and will stand in the Supreme Court as the case on appeal.

2. **Trial C b—Motion that defendant be denied the right to present defense held to be addressed to discretion of trial court in this case.**

   Where, in an action in ejectment the trial court orders the defendant to file a bond conditioned for the payment of such sum as the plaintiff might recover as reasonable rent for the property, and continues the case to the next term, the plaintiff's motion at the call of the case at the succeeding term that the defendant not be allowed to present his defense because of his failure to file the bond is in effect a motion that defendant's answer be stricken from the record and judgment by default entered, and is addressed to the discretion of the trial court, and the refusal of such motion is not reviewable on appeal.

3. **Landlord and Tenant D d—In this case held: evidence of termination of lease contract by lessor according to its provisions sufficient for jury.**

   Where a lease contract provides that the term of the lease should be for a period of five years subject to termination by the lessor at the expiration of any yearly period upon thirty days written notice, and for cancellation of the contract for condition broken, in an action in ejectment the granting of defendant's' motion as of nonsuit for that there was no allegation or evidence tending to show a breach of condition by the lessee for which the lease could be canceled, is error, there being evidence that the defendant entered into possession under the lease contract and that the plaintiff gave the notice required to terminate the lease at the expiration of a yearly period according to its terms.

APPEAL by plaintiff from *Barnhill, J.,* at June Term, 1930, of CARTERET. Reversed.

This action for the summary ejectment of defendant from land described in a license agreement entered into by and between plaintiff and defendant, and for the recovery of reasonable rent for said land since the expiration of defendant's term under said license agreement, was begun in the court of a justice of the peace of Carteret County on 18 February, 1930.

The action was docketed for trial in the Superior Court of said county on 1 March, 1930, on the appeal of plaintiff from the judgment of the justice of the peace that plaintiff is not entitled to recover therein.

At March Term, 1930, of the Superior Court of Carteret County, which began on 10 March, 1930, on motion of plaintiff, an order was made by Nunn, J., that defendant file a bond in the sum of $500, with sufficient surety to be approved by the court, conditioned for the payment by defendant to plaintiff of such sum as plaintiff might recover in this action as reasonable rent for said land, since the expiration of defendant's term under the license agreement. The action was thereupon continued to the next term of said court. Defendant excepted to said order and gave notice in open court of its appeal therefrom to the Supreme Court. This appeal was not perfected.

At June Term, 1930, when the action was called for trial, plaintiff moved the court to deny the defendant the right to present its defense, and for judgment by default, for the reason that defendant had failed to comply with the order made by Nunn, J., at March Term, 1930. This motion was denied, and plaintiff excepted. It does not appear on the record that defendant had filed the bond required by the order of Nunn, J.

It appeared from the evidence offered by plaintiff at the trial, that on or about 13 September, 1927, plaintiff and defendant entered into the license agreement set out in the case on appeal, which is in writing; that under the terms of this agreement, defendant entered into possession of the land described in the affidavit filed by the plaintiff at the commencement of this action, and has since remained in possession thereof, occupying and using the same for the purposes and on the conditions set out in the license agreement.

This license agreement contains the following provisions:

"(2). Term. This license shall continue for the term of five (5) years from and after 1 September, 1927, but subject to the termination by licensor at the expiration of the first year, or any subsequent yearly period by thirty (30) days prior written notice from the licensor to the licensee."

"(5). Cancellation. Licensor hereby reserves the right at any time to cancel and terminate this license forthwith, in event of the termination or failure of consummation of a certain sales contract now in force, or being negotiated between the parties hereto, or any agreement in continuation thereof, or in substitution therefor; or in case the licensee ceases to store, handle or sell the products of the licensor; or in case the licensee does not conduct the business on the licensed premises with due diligence in the judgment of the licensor; or in the event of the expiration or termination of a certain lease, dated 13 September, 1927, by and between G. J. Brooks, and wife, Onie Brooks, J. R. Duncan and C. R. Wheatley and wife, Osey G. Wheatley, and licensor."

Plaintiff contended that, written notice having been given by it to defendant, thirty days prior to 1 September, 1929, in accordance with the provisions of paragraph 2 of the license agreement, defendant's term as a tenant of plaintiff expired on 1 September, 1929, and that since said date defendant has been in possession of said land, holding the same after its term had expired. C. S., 2365, sec. 1.

At the close of the evidence for the plaintiff, judgment was rendered as follows:

"This cause coming on at this June Term, 1930, to be heard, and being heard before the undersigned judge and a jury, and plaintiff having rested after introducing the license or claimed lease, and notice claiming termination thereof, but not alleging or offering to prove any default or breach by defendant, on defendant's motion to nonsuit:

It is ordered and adjudged that the action be dismissed as of nonsuit, and plaintiff will pay the costs to be taxed by the clerk."

From this judgment, plaintiff appealed to the Supreme Court.

Moore & Dunn and W. O. Williams for plaintiff.
C. R. Wheatly and J. F. Duncan for defendant.

CONNOR, J. Defendant's motion to dismiss this appeal, for that no "case on appeal," as prescribed by statute or by the rules of this Court, appears in the record, is denied. The record, certified to this Court by the clerk of the Superior Court of Carteret County, contains a "case on appeal," signed by attorneys for plaintiff appellant, and filed in the office of said clerk on 17 July, 1930. Service of this "case on appeal," was accepted by attorneys for defendant appellee, on 17 July, 1930. The receipt of a copy of said "case on appeal" is acknowledged, in writing, by attorneys for appellee. It does not appear that exceptions or countercase was filed by said attorneys. The case on appeal, prepared by attorneys for appellant, and served on attorneys for appellee within the time allowed by the judge, is deemed approved by them, in the absence of exceptions or countercase. C. S., 643, *S. v. Palmore,* 189 N. C., 538, 127 S. E., 599; *S. v. Carlton,* 107 N. C., 956, 12 S. E., 44. Where appellant's statement of his case on appeal is sent to this Court, as a part of the transcript of the record, duly certified by the clerk of the Superior Court, and it appears that said statement of case on appeal was duly served on appellee within the time prescribed by statute, or allowed by the judge, and it further appears that no exceptions or countercase was served by the appellee on the appellant, it stands as the case on appeal in this Court. *Booth v. Ratcliffe,* 107 N. C., 6, 12 S. E., 112; *Russell v. Davis,* 99 N. C., 115, 5 S. E., 895.

Plaintiff's motion, made when the action was called for trial at June Term, 1930, that defendant be denied the right to present its defense at said trial, for that defendant had failed to file the bond required by the order made at March Term, 1930, was in effect a motion that defendant's answer be stricken from the record, and that plaintiff recover judgment by default, for want of an answer. No terms were imposed by the court, or accepted by the defendant when the order was made at the March Term. It did not appear that defendant's failure to file the bond was wilful or contemptuous. At best, the motion was addressed to the discretion of the judge presiding at June Term. In no event, was plaintiff entitled to a favorable ruling on its motion as a matter of law. *Finance Co. v. Hendry,* 189 N. C., 549, 127 S. E., 629; *Lumber Co. v. Cottingham,* 173 N. C., 323, 92 S. E., 9; and 168 N. C., 544, 84 S. E.,

864. The ruling of the judge is not reviewable on plaintiff's appeal to this Court. *Power Co. v. Lessem Co.,* 174 N. C., 358, 93 S. E., 836.

It appears from the judgment dismissing the action as of nonsuit, that the learned judge, who presided at the trial, was of opinion that in the absence of allegation and evidence tending to show a default or breach by defendant of some provision in its agreement with plaintiff, with respect to its occupancy and use of the premises described in the license agreement, plaintiff is not entitled to recover in this action. In this, we think, he was in error. This is not an action to cancel the license agreement, under the provisions of paragraph 5. It is plaintiff's contention that defendant's term under said agreement expired on 1 September, 1929, as the result of the notice given pursuant to the provisions of paragraph 2. In accordance with this contention, plaintiff demands judgment for the summary ejectment of defendant from the premises, and for the recovery of reasonable rent since 1 September, 1929. As there was evidence at the trial, tending to show that defendant entered into possession under the license agreement, and that notice as required by paragraph 2 of the agreement was given by plaintiff to defendant, there was error in the judgment dismissing the action as upon nonsuit. Defendant's motion for judgment of nonsuit should have been denied, and the evidence submitted to the jury upon appropriate issues. The judgment is, therefore,

Reversed.

MRS. JESSE J. THURSTON v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 1 October, 1930.)

1. **Railroads D b—Evidence of railroad company's negligence causing accident at crossing held sufficient to be submitted to jury.**

   Where, in an action against a railroad company to recover damages sustained by the plaintiff in a collision between her automobile and defendant's train at a grade crossing of a much used street of a town, there is evidence tending to show that the defendant did not ring a bell or blow a whistle as the train approached the crossing, that the watchman employed by the defendant was standing some distance from the crossing with his signal hanging by his side, and failed to warn the plaintiff before she started across the track, is *held* sufficient to be submitted to the jury and overrule defendant's motion as of nonsuit.

2. **Same—Evidence of plaintiff's contributory negligence in crossing defendant's track held insufficient to bar recovery as matter of law.**

   Where, in an action to recover damages sustained in a collision between plaintiff's automobile and defendant's train at a grade crossing, there is evidence tending to show that the plaintiff slowed down her automobile to a speed not exceeding five miles per hour and looked and listened before attempting to cross the tracks, and that she saw defendant's watchman some distance from the crossing standing with his back to her, and that as the front wheels of her car had passed over the first rail the watchman ran towards her crying "stop," that she stopped and attempted to back from the track when her engine stalled and was hit by the train, with further evidence that if the plaintiff had not stopped, but had gone on across the track the accident would not have occurred: *Held*, the evidence of plaintiff's contributory negligence is insufficient to bar her recovery as a matter of law, and the refusal of defendant's motion as of nonsuit was proper.

3. **Appeal and Error J e—Error in this case, if any, held harmless and appellant not entitled to new trial upon his exceptions.**

Exceptions to the trial court's ruling upon the admission of evidence will not be sustained when the evidence is of little probative value and the error, if any, is harmless; nor will a new trial be awarded for error in the court's charge when the alleged error, if any, does not prejudice the appellant.

APPEAL by defendant from *Small, J.*, at April Term, 1930, of JOHNSTON. No error.

This is an action to recover damages for injuries to plaintiff's automobile, and also to her person, caused, as alleged in the complaint, by the negligence of the defendant. The defendant denied the allegations of negligence, in the complaint, and in its answer relied upon its allegation that plaintiff by her own negligence contributed to the injuries alleged.

The jury answered the issues involving defendant's liability in accordance with the contentions of the plaintiff, and assessed her damages, resulting from injuries to her automobile, at $350, and her damages resulting from injuries to her person, at $1,000.

From judgment that plaintiff recover of the defendant the sum of $1,350, and the costs of the action, defendant appealed to the Supreme Court.

Wellons & Wellons and Gulley & Gulley for plaintiff.
Abell & Shepard and Rose & Lyon for defendant.

CONNOR, J. There was evidence offered at the trial of this action tending to show that the injuries sustained by plaintiff were caused by the negligence of defendant, as alleged in the complaint.

The said injuries were caused by a collision between a train operated by defendant, on one of its tracks, and an automobile owned and driven by plaintiff. The collision occurred between 9 and 10 o'clock, on the morning of 28 November, 1928, at a public crossing in the town of Dunn, N. C. At this crossing Broad or Main Street in said town passes over and across three parallel tracks owned by defendant. As defendant's train approached said crossing on one of said tracks, plaintiff was driving her automobile on Broad Street toward the crossing. There was evidence tending to show that defendant did not ring a bell, or blow a whistle, as its train approached the crossing. There was also evidence tending to show that as plaintiff was driving toward the crossing, the watchman, employed by defendant to give warning to travelers on the street, was standing some distance from the crossing, talking to some one, with his signal hanging by his side. Plaintiff testified that no signal or warning was given her of the approach of defendant's train, before she drove on defendant's track. This evidence was sufficient to show that defendant was negligent as alleged in the complaint and that such negligence was the proximate cause of the injuries sustained by plaintiff. In *Earwood v. R. R.,* 192 N. C., 27, 133 S. E., 180, it is said:

"The crossing in controversy was a grade crossing, and according to the evidence, one that was much used by the public. It was therefore the duty of the defendant to use due care in giving timely warning of the approach of its train either by sounding the whistle or ringing the bell at the usual and proper place in order that those approaching or using the crossing could be apprised that the train was at hand. It is established law that failure to perform this duty constitutes negligence. *Williams v. R. R.,* 187 N. C., 348, 121 S. E., 608; *Pusey v. R. R.,* 181 N. C., 137, 106 S. E., 452; *Goff v. R. R.,* 179 N. C., 216, 102 S. E., 320; *Bagwell v. R. R.,* 167 N. C., 611, 83 S. E., 814; *Edwards v. R. R.,* 132 N. C., 100, 83 S. E., 585." See, also, *Moseley v. R. R.,* 197 N. C., 628, 134 S. E., 645.

It does not appear from all the evidence offered at the trial of this action that a clear case of contributory negligence by the plaintiff had been made out. The principle on which *Harrison v. R. R.,* 194 N. C., 656, 140 S. E., 598, was decided is, therefore, not applicable to the instant case.

There was evidence tending to show that as plaintiff was approaching the crossing, and within 10 or 15 yards of defendant's track, she slowed down her automobile to a speed not exceeding five miles per hour. She looked and listened and did not see or hear the approaching train. As she turned her head from the left to the right, she saw the crossing watchman standing, with his back toward her, talking to some one, and with his signal hanging by his side. She then drove her automobile on the track. After her front wheels had passed over the first rail, she saw the train backing toward the crossing. She had not seen it before driving on the track, because it was obscured by a cotton platform on which a large number of bales of cotton were piled. At this moment the crossing watchman ran toward her, holding up his sign, and calling, "Stop, stop, stop!" She stopped her automobile and attempted to back it from the track. Her engine stalled, and then the train struck the automobile, causing the injuries. But for the belated orders of the watchman, plaintiff would have passed over the crossing and avoided the collision.

There was evidence offered by defendant in contradiction of the evidence tending to show that the defendant, by its negligence, caused plaintiff's injuries. There was also evidence tending to support defendant's allegation that plaintiff by her own negligence contributed to her injury. This conflicting evidence was properly submitted to the jury upon the issues involving defendant's liability. There was no error in the refusal of defendant's motion for judgment as of nonsuit.

We have examined, with care, defendant's assignments of error based on its exceptions to the rulings of the court on its objections to the admission of certain evidence offered by the plaintiff. These assignments of error cannot be sustained. The evidence, if properly subject to objection, was of little probative value, and harmless.

If there was error in the instructions given by the court to the jury, to which defendant excepted, we are of opinion that such error was not prejudicial to the defendant. These instructions were pertinent chiefly to the issue involving contributory negligence, which the jury answered against the defendant. There was no error in the refusal of the court to give in its charge to the jury the instructions as requested by defendant. As we find no error for which the defendant is entitled to a new trial, the judgment will be affirmed. If the facts are as the jury found, the plaintiff is entitled to judgment. There was ample evidence to sustain the assessment of damages, resulting from the injuries to plaintiff's automobile and to her person.

No error.

ELVIRA FUQUAY, ADMINISTRATRIX, v. A. AND W. RAILWAY COMPANY.

(Filed 1 October, 1930.)

1. **Judgments L a—Nonsuit in action against railroad under Federal Act does not bar subsequent action on same evidence brought under State law.**

   A judgment as of nonsuit upon the merits of an action brought by the administratrix of an injured employee of a railroad company under the Federal Employers' Liability Act will not operate as a bar to the same cause brought under the laws of this State, C. S., 3466, 3467, the law and facts applicable to the first not being identical with those applicable to the second.

2. Abatement and Revival C a—Action for negligent injury not causing death survives to personal representative of injured person.

The fact that the injury in suit did not cause the death of the injured party, but that death resulted from another cause does not now prevent the survival of the action under the amendment of Public Laws 1915, ch. 58, C. S., 159, 162, 461, 462.

APPEAL by plaintiff from *Devin, J.,* at July Term, 1930, of LEE. Reversed.

K. R. Hoyle and A. A. McDonald for plaintiff.
Williams & Williams for defendant.

CLARKSON, J. The original complaint, filed 4 August, 1928, contained the following: "First, That plaintiff is a resident of Harnett County, North Carolina, and defendant is a railroad corporation engaged in *interstate commerce.* Second, That on or about 29 January, 1928, while in the employment of the defendant and engaged in the line of such employment in loading cross-ties on a flat car at Lillington, N. C.," etc.

After the dismissal or nonsuit of the original action, at April Term, 1929, Harnett Superior Court, a new action was instituted and a new complaint filed 15 July, 1929. It contains the following: "First, That plaintiff is a resident of Harnett County, North Carolina, and defendant is a railroad corporation engaged in *intrastate commerce,* as a common carrier, operating a line of railroad from Sanford, N. C., to Lillington, N. C. Second, That on or about 29 January, 1928, while in the employment of the defendant as section hand and engaged in the line of such employment of loading cross-ties," etc.

The first action by plaintiff was interstate and brought under the Federal Employers' Liability Act. This action, after the evidence was introduced, was on motion of defendant dismissed, or judgment rendered as in case of nonsuit. C. S., 567. The plaintiff brings the present action intrastate. C. S., 3466 and 3467. Is *res judicata* applicable? We think not. It was so held in the court below, but we think this was error.

In *Hampton v. Spinning Co.,* 198 N. C., at p. 240, it was said: "But, if upon the trial of the new action, upon its merits, in either event, it appears to the trial court, and is found by such court as a fact, that the second suit is based upon substantially identical allegation and substantially identical evidence, and that the merits of the second cause are identically the same, thereupon the trial court should hold that the judgment in the first action was a bar or *res adjudicata,* and thus end that particular litigation." *Midkiff v. Insurance Co.,* 198 N. C., 569; *Chappel v. Ebert,* 198 N. C., 575; *Ingle v. Green, ante,* 149.

Actions interstate, under the Federal Employers' Liability Act, and actions intrastate, under the State statutes, are not identical.

It is said in *Capps v. R. R.,* 183 N. C., at p. 187: "A change from one to the other not only invoked a change from fact to fact—from interstate to intrastate commerce—but also a change from law to law—from the Federal to the State statute. *Union Pac. R. Co. v. Wyler,* 158 U. S., 285. Thus the amendment filed in the original proceeding, alleged a new and independent cause of action, and was therefore a departure from the initial pleading. 'A departure may be either in the substance of the action or defense, or the law on which it is founded; as if a declaration be founded on the common law, and the replication attempt to maintain it by a special custom, or act of Parliament.' 1 Chitty on Pleading, pp. 674, 675." The case of *Wabash R. Co. v. Hayes,* 234 U. S., 86, 58 Law Ed., 1227, is distinguishable.

There seems to be additional specifications of negligence in the new complaint, and sufficient to be submitted to a jury. We will not discuss them, as the case goes back for trial.

John Fuquay, since the actions were commenced, has died, and the plaintiff has been appointed administratrix and contends that the cause of action survived to her as administratrix. The injuries sued for in this action did not cause plaintiff's intestate's death. We think the contention of the administratrix is now the law in this jurisdiction. See C. S., 159, 162, 461, 462. Under section 157, Revisal, actions which do not survive are the following: "(2) Causes of action for false imprisonment, assault and battery, or other injuries to the person, where such injury does not cause the death of the injured party."

We find in the Public Laws of 1915, ch. 38, the following: "That subsection two of section one hundred and fifty-seven of the Revisal of one thousand nine hundred and five, be amended by inserting the word 'and' between the words 'imprisonment' and 'assault' in line one of the same, and by striking out all of said subsection after the word 'battery' in said line one." Thus, the following is stricken from the Revisal: "Or other injuries to the person, where such injury does not cause the death of the injured party." So the present action survives in favor of plaintiff.

For the reasons given, the judgment of the court below is

Reversed.

DAISY W. TUCKER, GUARDIAN OF J. E. WARREN, v. GUY V. SMITH.

(Filed 1 October, 1930.)

1. **Deeds and Conveyances C c—Word "heirs" not necessary to convey fee even before 1879 if other appropriate words of inheritance were used.**

   Although a deed to lands executed and delivered prior to the effective force of C. S., 991, would not pass an estate in fee simple if the deed entirely omitted the word "heirs" or other appropriate words of inheritance, a deed executed before such date to a school committee "and their successors in office in fee simple" is sufficient to pass a fee simple title to the lands conveyed therein.

2. **Same—In this case held: words used in deed were not sufficient to create trust or condition subsequent, and deed passed fee simple.**

   A deed to lands to a school board in fee simple "for the use and benefit of the white children in said school district and no further" merely marks out the use and purpose of the conveyance, and does not impose a trust or condition subsequent working a reversion of the title upon condition broken.

3. **Schools and School Districts D c—School board held authorized to sell property involved in this case.**

   Where property has been conveyed to the school board of a county in fee simple, and used for school purposes from the date of the conveyance until 1926, the school board is authorized by C. S., 5470, to sell the property and execute a deed therefor.

CIVIL ACTION, before *Barnhill, J.*, at May Term, 1930, of PITT.

The trial judge found the facts, which are substantially as follows: On 20 August, 1877, J. A. Pollard and wife executed a deed for a half acre of land to A. A. Tyson, A. J. Outerbridge, and J. A. Pollard, "and their successors in office for District No. 45 for the white race." The habendum clause of the deed was "to have and to hold said land with all privileges and appurtenances thereunto belonging to the said school committee, viz.: A. A. Tyson, A. J. Outerbridge and J. A. Pollard, and their successors in office in fee simple, for the use and benefit of the white children in said school district, and no further." There was also a clause of warranty. The deed was recorded 27 June, 1878. On 22 January, 1891, the said J. A. Pollard and wife conveyed a tract of land containing 40⅛ acres to J. E. Warren. Said tract of land embraced the school site of one-half acre contained in the deed of 1877. Warren, the grantee in the later deed, died in 1920, and in the division of his estate among his heirs the said tract of 40⅛ acres was assigned to the infant plaintiff, J. E. Warren. On 25 May, 1929, the heirs at law of J. A. Pollard executed and delivered a quitclaim deed for the school site to the plaintiff. The school site tract was used for school purposes until

1926, when it was abandoned as a school site and the board of education of Pitt County, by proper deed, conveyed the said site to the defendant Smith.

From the foregoing facts the trial judge was of the opinion "as a matter of law that the language of said deed is not sufficient in form or substance to impose a trust, or to limit the fee therein conveyed, or to create a condition subsequent, breach of which would cause the title to revert to the heirs of the said James A. Pollard." Whereupon, it was adjudged that the plaintiff recover nothing.

From judgment so rendered plaintiff appealed.

S. J. Everett for plaintiff.
F. G. James & Son for defendant.

BROGDEN, J. The plaintiff seeks to recover the school site tract of a half acre upon three theories, to wit:

1. That the deed made by Pollard to the school committee in 1877 did not contain the word "heirs."

2. That the words in said deed "for the use and benefit of the white children in said school district and no further" created or imposed a trust, so that when the property was abandoned as a school site, it thereupon reverted to the grantor.

3. That the board of education of Pitt County had no title to the property, and hence no authority to convey the same.

It must be conceded that prior to 1879 the word "heirs" was in certain instances held to be necessary to create a fee-simple estate. However, the decision in *Vickers v. Leigh,* 104 N. C., 248, 10 S. E., 308, declared that the trend of judicial utterances plainly indicated a disposition to relax the rigor of the common-law rule that invariably demanded the presence of the word "heirs" as a necessary requisite for the creation of an estate of inheritance by deed. Seeking to avoid the manifest idolatry of a word, the courts by a process of highly technical reasoning and bold transposition of words undertook to construe conveyances so as to effectuate the hypothetical intention of the grantor without primary regard for technical terms. This liberalizing tendency finally headed up in a statute, now known as C. S., 991, and enacted in 1879. Notwithstanding, if a deed was executed prior to 1879, entirely omitting the word "heirs," or other appropriate words of inheritance, and no equity was alleged or proven, then no estate in fee simple would pass. *Allen v. Baskerville,* 123 N. C., 126, 31 S. E., 383; *Cullens v. Cullens,* 161 N. C., 344, 77 S. E., 228.

An examination of the deed before us discloses that while the word "heirs" was not used, the words "and their successors in office in fee simple" plainly indicate and declare that a fee-simple title was actually conveyed. Hence the first theory maintained by the plaintiff must fail.

Nor can the second theory prevail. *Church v. Young,* 130 N. C., 8; *Brittain v. Taylor,* 168 N. C., 271, 84 S. E., 280; *Blue v. Wilmington,* 186 N. C., 321, 119 S. E., 741; *Hall v. Quinn,* 190 N. C., 326, 130 S. E., 18.

Under the principles announced in the foregoing decisions, the words in the deed of 1877 "for the use and benefit of the white children in said school district and no further" merely mark out and identify the purpose of the conveyance and do not rise to the dignity of imposing a trust or condition subsequent, working a reversion of the title.

It appearing as a fact that the property had been used for school purposes from the date of the conveyance until 1926, the school board of Pitt County was authorized by C. S., 5470 to sell the property and execute a deed therefor.

We therefore hold that the judgment rendered was correct.

Affirmed.

ANNIE P. HAMILTON v. CITY OF ROCKY MOUNT.

(Filed 1 October, 1930.)

1. **Municipal Corporations E a—Rule that city is not liable for negligence in discharge of governmental function has exception in case of streets.**

   Although a municipal corporation is not liable for the negligence of its employees in the discharge of a governmental function, it is liable for such negligence in the discharge of a private or *quasi*-private function which is conferred not primarily or chiefly from considerations connected with the State at large, but for the private advantage of the community incorporated therein, but the rule that it is not liable for negligence in the discharge of a governmental function has an exception in the case of the proper maintenance and safe condition of its streets.

2. **Municipal Corporations E c—Complaint in this case held to state a cause of action against city for failure to properly maintain streets.**

   Where, in an action against a city to recover for a personal injury, the plaintiff alleges that the city owned its own power plant and transmission lines for the generation and distribution of current for its own use and for the use of individuals for profit, and that, through its employees, it had dug a ditch and was laying a cable in a street for conducting current for lighting the street, and that the cable was pulled along the ditch by a motor vehicle which caused the cable to rise up out of the ditch when pulled taut, and that the plaintiff was injured by the cable rising up out of the ditch when she was attempting to cross the street, and that there was no warning or notice that the street was in an unsafe condition: *Held*, a demurrer to the complaint on the ground that it appears therein that the city was discharging a governmental function is properly overruled, the liability of a city for injury caused by its negligent failure to properly maintain its streets and warn of danger in regard thereto being an exception to the rule that it is not liable for negligence in the discharge of a governmental function, and the decision of the question of whether in the instant case the city was discharging a private or governmental function is unnecessary.

3. **Pleadings D c—In this case held: defendant's demurrer was bad as a speaking demurrer and his demurrer ore tenus related to pleading to which formal demurrer was addressed.**

Where, in an action against a city to recover for a personal injury, the defendant interposes a demurrer on the ground that the complaint discloses that the injury was inflicted by the city in the discharge of a governmental function for which it could not be held liable, and the demurrer is sustained, and thereafter the plaintiff files an amended complaint stating a good cause of action, and the defendant interposes a demurrer thereto on the ground that the plaintiff was estopped by the judgment on the first demurrer: *Held*, the second demurrer, depending upon matters outside the pleading, is bad as a speaking demurrer, and defendant's motion for dismissal on the ground that the plaintiff was concluded by the former judgment and his offer to read the former pleadings is in effect a demurrer *ore tenus* which is allowed only after the filing of a formal demurrer and can be considered only in its relation to the pleading to which the formal demurrer is addressed, except when filed for want of jurisdiction or that the complaint fails to state a cause of action.

APPEAL by defendant from *Sinclair, J.*, at January Term, 1930, of NASH. Affirmed.

This is an action for damages for personal injury alleged to have been caused by the defendant, a municipal corporation created under the laws of North Carolina.

The amended complaint contained the following allegations:

3. That on and prior to 13 November, 1928, the defendant in its private and corporate capacity owned and operated a large steam plant, for the generation and distribution of electric current to the citizens of the city of Rocky Mount, and also to other persons, corporations and municipalities outside of the city, for profit; that for the distribution of said electric current, as aforesaid, the defendant owned and maintained a system of wires, poles, cables, transformers, etc., throughout the city of Rocky Mount, and elsewhere; that a part of the electric current which was transmitted over said distribution system was sold to the inhabitants of the city for profit, and a part thereof was used for the lighting of streets and sidewalks.

4. That the defendant also maintains a number of public streets and sidewalks within its corporate limits, among which are Western Avenue,

which runs east and west, and Church Street, which runs north and south, said two streets intersecting each other one block west of Main Street.

5. That on 13 November, 1928, the defendant, through its employees, was engaged in the construction of a street lighting system along the eastern side of Church Street, and in the progress of such construction was causing to be laid along the sidewalk on the east side of Church Street, in said city, a cable, the purpose of which was to supply electric current for the illumination of a great number of high-powered lamps, situate upon the top of iron or steel posts, which were to be erected along the eastern side of said Church Street; that said system of lamps when completed would constitute what is commonly called a white way, would illuminate the street, sidewalk and premises of abutting property owners, and would become an integral part of the city's distributing system; that said cable was being laid in a trench or ditch, which had been cut and drilled along the eastern side of Church Street on or near to the sidewalk, which extended along the eastern side of said street; that this trench or ditch intersected and crossed the sidewalks adjacent to Western Avenue, said trench or ditch being several inches in depth and several inches in width.

6. That at one end the said cable, which was approximately one and one-half inches in diameter, was mounted on an enormous stationary spool and drum, from which it was pulled or stretched along said sidewalk by means of a tractor or other motor vehicle, attached to the other end; that while the cable was inert it was lying in the bottom of the aforesaid trench or ditch, but when it was tightened or made taut by a pull from the tractor or other motor vehicle, it would suddenly rise out of the trench or ditch several feet, so as to obstruct Western Avenue and the sidewalks adjacent thereto; that during the laying of said cable the same was frequently jerked and caused to rise out of the bottom of said trench or ditch, the process being a continuous one in its nature, and at the time hereinafter complained of, had been going on and existing for several hours, or perhaps, even longer, the exact time being unknown to this plaintiff.

7. That the existence of said trench or ditch intersecting Western Avenue and the sidewalks adjacent thereto, as above described, and the laying of the cable across said street and sidewalks, as aforesaid, created and constituted an obstruction and dangerous condition upon said street and sidewalks, of which said obstruction and dangerous condition the defendant had actual knowledge, or if it did not have actual knowledge of such obstruction and dangerous condition, in the exercise of reasonable care and diligence, could have and should have, had such knowledge.

8. That on the afternoon of 13 November, 1928, plaintiff, in company with her daughter, started from her home along Western Avenue,

which intersects Church Street, as above described, and as she approached said intersection she noticed that there was some work going on in that vicinity, but she also noticed that other travelers and pedestrians were crossing the intersection and going along said street and sidewalk; that there was no sign posted in the vicinity of said ditch and cable warning the public of any existent danger, nor were any signals or warnings given to the plaintiff that there was any obstruction or danger; that plaintiff and her daughter, in full view of the employees who were engaged in the laying of said cable, as aforesaid, started across the intersection of said streets as they saw other pedestrians doing; and plaintiff's daughter stepped over said ditch, at the bottom of which the said cable was lying, and was proceeding along the sidewalk adjacent to Western Avenue toward Main Street, but when the plaintiff, who was just behind her daughter, was attempting to get over said ditch, said cable suddenly, and with great and terrific force, came up, as it had been continuously doing throughout the period of the laying of said cable, as aforesaid, from the said ditch or trench in which it was lying, thereby obstructing her passage, and entangling her in such a manner as to throw her violently to the pavement, inflicting upon her serious, painful and permanent injuries, as hereinafter more particularly set forth.

9. That at the time when plaintiff attempted to cross the intersection of said streets, and to step over said open and unguarded ditch and cable, as aforesaid, and at the time when she received her injuries, she knew nothing of the manner in which said cable was being laid, and she was entirely ignorant of the dangerous condition and obstruction existent at the place where her injuries were inflicted.

10. That it was the duty of the defendant to exercise due care to maintain its streets and sidewalks, in a reasonably safe condition, and in allowing the existence of the obstruction and dangerous condition upon its streets and sidewalks, as above described, the defendant breached its duty in this respect which it owed to the plaintiff, and this breach of duty, together with its negligence and failure to warn the plaintiff of said obstruction and danger, and its neglect and failure to guard or barricade the aforesaid place of danger, constituted gross negligence upon the part of the defendant, which said negligence was the proximate cause of plaintiff's injury.

11. That when the plaintiff was thrown to the ground, through the negligence of the defendant, as aforesaid, her face and features were lacerated and bruised, her nose broken, the frontal sinus fractured, the knee cap dislocated, the pelvis fractured, three vertebrae dislocated or fractured, and her injury and shock were of such nature and extent as to cause her to be totally and permanently incapacitated; that prior to

her injuries plaintiff had been for a number of years in excellent health, had been able to take care of her home, and in addition to attending to the ordinary duties of housewife and mother, she had been actively engaged in religious and social undertakings in her community; that in addition to the physical injuries sustained by her, plaintiff has suffered great pain and untold mental anguish.

The defendant demurred to the amended complaint on the ground that it does not set forth facts sufficient to constitute a cause of action, because it appears on the face of the complaint that the alleged negligence occurred and resulted from an act of the defendant's employees while installing an electric cable, the purpose of which was to supply a current for a "white way" street lighting system; and while so installing said cable for the purpose of lighting its streets the defendant was exercising a governmental function solely for the benefit and protection of the public and is not, therefore, civilly liable for the negligence of its employees resulting therefrom.

Judge Sinclair overruled the demurrer and the defendant excepted and appealed.

Finch, Rand & Finch, Cooley & Bone and Biggs & Broughton for plaintiff.

Spruill & Spruill, Battle & Winslow and Thorp & Thorp for defendant.

ADAMS, J. The plaintiff alleges that the defendant in its private and corporate capacity owns and operates a plant for generating and distributing electricity for profit, not only to citizens within the corporate limits, but to persons and corporations outside the city; that for accomplishing these purposes the defendant owns and maintains also a system of wires, poles, and transformers within and without the city limits; and that a part of the electric current, not sold for profit, is used in lighting the streets.

If it be conceded for the present purpose that the lighting of its streets by the defendant is a governmental function, the distribution of electricity for a profit is a privilege exercised in its private capacity for its own benefit. As to the proprietary or private character of a municipal corporation "the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the State at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers, and to the property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quoad hoc* as a private corporation." 1 Dillon (5 ed.), sec. 109.

Upon the doctrine of the twofold character of municipal corporations the defendant rests its contention that if the complaint sets forth certain acts done by the defendant in its governmental capacity and other acts which are of a proprietary, private or *quasi*-private nature, the plaintiff alleges that she was injured while the city was engaged in the construction of a system for lighting its streets, which it contends, was merely the performance of a public or governmental duty.

There is substantial unanimity of opinion upon the proposition that a city when exercising its private or corporate powers is liable in damages for the negligence of its employees and, as a rule, that it is not liable for negligence in its exercise of a governmental function. 6 McQuillin's Mun. Corporations (2 ed.), sec. 2792; *Mack v. Charlotte,* 181 N. C., 383; *James v. Charlotte,* 183 N. C., 630; *Scales v. Winston-Salem,* 189 N. C., 469; *Parks-Belk Co. v. Concord,* 194 N. C., 134; *Cathey v. Charlotte,* 197 N. C., 309.

The law which imposes liability in one case and not in the other has been stated in a number of the decisions of this Court, notably *Fisher v. New Bern,* 140 N. C., 506; *Harrington v. Wadesboro,* 153 N. C., 437; *Terrell v. Washington,* 158 N. C., 282; *Woodie v. Wilkesboro,* 159 N. C., 353; *Harrington v. Greenville, ibid.,* 632; *Asbury v. Albemarle.* 162 N. C., 247; and *Munick v. Durham,* 181 N. C., 188. In some of these cases there is strong intimation, if not express decision, that according to the complaint, which the demurrer admits to be true, the city was not engaged in the exercise of such governmental function as would exempt it from liability. But the decision of this question is not essential to affirmance of the judgment. In the complaint there is clear and definite allegation that the city negligently failed to maintain its streets in a reasonably safe condition; that the cable by which the plaintiff was injured extended along the sidewalk and created a dangerous obstruction which imperiled the safety of those who had occasion to use the streets. This allegation removes the defense of a governmental function. The controlling principle is given by McQuillin: "And where the right of action is based on the failure of the municipal corporation to use ordinary care in maintaining its streets, public ways and sidewalks in a reasonably safe condition for travel in the usual modes, such negligence in a majority of the states, aside from statutory or charter provision, furnishes another exception to the principles mentioned, and hence the governmental function doctrine in such cases has no application." 6 Mun. Corporations (2 ed.), sec. 2793. "This rule," he says, "is founded upon the 'illogical exception' to the general rule of the common law disallowing actions against municipalities for negligence in the discharge of duties imposed upon them for the sole benefit of the public and from which they derive no compensation or benefit in their corporate capacity. It is obvious that the obligation, so far as travelers are concerned, is one of a public character, fulfilled, not for pecuniary profit or private corporate advantage, but exercised as a purely governmental function. It is generally said that the liability arises by implication from the nature of the subject and the vast powers conferred upon such corporations, including the exclusive control of the streets. The additional reason is presented in some decisions, that making and improving streets and keeping them in repair is a ministerial function and relates to corporate interests only." 7 Mun. Corporations (2 ed.), sec. 2902.

Whether this doctrine is illogical is a question with which we are not concerned. This Court has consistently adhered to the principle that the liability of municipal corporations for injury caused by defective streets is "too firmly established to admit of further question." *Harrington v. Greenville, supra.* The purpose of the defendant, it will be observed, was not to construct or improve its streets and sidewalks, but to install a system of electric lights.

One other question is to be considered: The plaintiff filed her first complaint on 6 June, 1929; the defendant demurred, and Judge Daniels sustained the demurrer for the reason that the complaint had no allegation that the city was engaged in the exercise of any corporate function. This defect was supplied in the amended complaint and the defendant's demurrer thereto was overruled. The defendant now contends that the plaintiff is concluded by the judgment sustaining the first demurrer and relies upon the doctrine of estoppel by judgment.

This asserted defense does not appear on the face of the amended complaint; and when a demurrer invokes a fact which does not appear on the face of the pleading demurred to, it is called a "speaking demurrer," and as such is insufficient. *Sandlin v. Wilmington,* 185 N. C., 257. To meet this objection the defendant moved that the action be dismissed because the question raised by the demurrer had been finally determined by the judgment of Judge Daniels, and offered to read the first complaint and the first demurrer.

The motion was in legal effect a demurrer *ore tenus,* which, when a formal demurrer is filed, is permissible for stating other causes which could have been included in the formal demurrer; but such objection (except when there is a want of jurisdiction or the complaint does not state a cause of action) is considered only in its relation to the particular pleading to which the formal demurrer is addressed. *Mountain Park Institute v. Lovill,* 198 N. C., 642.

There was no error in denying the defendant's motion. The defense may be interposed by answer.

Judgment affirmed.

CHARLES E. HAMILTON v. CITY OF ROCKY MOUNT.

(Filed 1 October, 1930.)

APPEAL by defendant from *Sinclair, J.*, at January Term, 1930, of NASH. Affirmed.

Finch, Rand & Finch, Cooley & Bone and Biggs & Broughton for plaintiff.

Spruill & Spruill, Battle & Winslow and Thorp & Thorp for defendant.

ADAMS, J. The disposition of this case is controlled by the decision in *Hamilton v. Rocky Mount, ante,* 504. Judgment

Affirmed.

L. B. GRADY AND WIFE v. BORDEN BRICK AND TILE COMPANY.

(Filed 1 October, 1930.)

1. **Deeds and Conveyances C c—In this case held: deed conveyed permanent right-of-way to grantee whose transferee succeeded to its rights.**

   Where a deed conveys standing timber with the right to construct and use roads, tramways and railroads thereon for the purpose of cutting and removing the trees conveyed, and also conveys a right-of-way sixty feet wide for a main railroad as well as any branch road planned by the grantee, its successors and assigns, the right-of-way to be used by it permanently, the consideration expressed not being confined to the right to the trees alone: *Held,* although the right to enter upon the land for the purpose of cutting and removing the trees expired when the trees conveyed had been removed, by the plain language of the deed a permanent right-of-way sixty feet wide was conveyed to the grantee, and one claiming under a deed from the grantee has the right to the easement and its use for other private purposes, in this case the right to transport clay for brick over the land.

2. **Corporations G a—Corporation acquiring right of way for railroad need not have right to operate as common carrier to use it for private road.**

   Where a corporation has acquired by deed a permanent right-of-way over the lands of the original grantor for a railroad, it is not necessary that the corporation have the charter right to operate as a common carrier in order to use the right-of-way for a private railroad necessary to the carrying out of the powers expressly given it in its charter.

APPEAL by plaintiffs from *Sinclair, J.,* at April Term, 1930, of WAYNE. Affirmed.

This is an action for judgment perpetually restraining and enjoining defendant from entering upon and using a certain right-of-way over and across the lands of the plaintiffs, located in Wayne County, and for other relief.

At the trial judgment was rendered as follows:

"This cause coming on to be heard, all parties agreed upon a statement of facts, which is as follows:

1. The plaintiffs are residents of Wayne County, State of North Carolina; and the defendant is a corporation, duly organized under the laws of the State of North Carolina, with its principal office and place of business in Goldsboro, Wayne County, North Carolina.

2. That on 28 January, 1911, Daniel Grady and wife, Julia Grady, executed and delivered to the Virginia Lumber and Box Company an instrument, a copy of which is attached and marked Exhibit 'A,' and taken as a part of this paragraph. (Said instrument is duly recorded.)

3. That the Virginia Lumber and Box Company about the year 1915, laid out and constructed a tramway or log road, narrow gauge, and said log road or tramway extended from a point south of the city of Goldsboro, through the lands described in the timber deed as described in Exhibit 'A,' and also through several other tracts of land, for the distance of several miles, on each side of the lands of these plaintiffs. Soon after the completion of the construction of the log road, or tramway, the Virginia Lumber and Box Company operated over the said log road, or tramway, narrow gauge cars and narrow gauge engines, for the purpose of removing the timber on the lands described in paragraph two, and for the purpose of removing other timber belonging to the Virginia Lumber and Box Company. That, on 17 April, 1928, the Virginia Lumber and Box Company had cut and removed all of its timber on the lands described in Exhibit 'A,' as attached to this judgment, and had cut and removed all the timber removable, adjacent to and removable on the road or tramway through, and constructed on, the lands described in Exhibit 'A'; having constantly used the tramroad or log road, or tramway, narrow gauge, up to about 17 April, 1928.

4. That on 17 April, 1928, the Virginia Lumber and Box Company did discontinue the use of the log road or tramway.

5. That on 17 April, 1928, the Virginia Lumber and Box Company executed a certain instrument and delivered said instrument to the Borden Brick and Tile Company, a copy of which instrument is hereto attached and marked Exhibit 'B,' and made a part of this paragraph; on which date the Borden Brick and Tile Company took possession of the right-of-way and narrow gauge log road above referred to, and has been in the constant use of the same since that date.

6. That, the Virginia Lumber and Box Company is now, and prior to 1911 was, a corporation, organized under the laws of the State of Virginia; it has, at all times, been engaged in the cutting, removing and manufacturing of timber into lumber. This Lumber and Box Company has never been authorized or licensed to operate as a common carrier. The Borden Brick and Tile Company is a corporation, organized under the laws of the State of North Carolina, and is, and at all times since its organization, has been engaged in mining and removing deposits of clay from the ground, and in moulding and burning this clay into brick; this brick and tile company is not now, and has never been licensed to operate as a common carrier; the Borden Brick and Tile Company is not now, and has never been engaged in the cutting and removing and manufacturing of timber. Among other powers contained in the charter of the Borden Brick and Tile Company, was the power to purchase, sell and convey property, real and personal.

7. Under the paper-writing described in Exhibit 'B,' attached to this judgment, the Borden Brick and Tile Company, has taken possession of the right-of-way formerly held and used by the Virginia Lumber and Box Company, and conveyed by the instrument marked Exhibit 'A'; the Borden Brick and Tile Company is now operating certain narrow-gauged cars and engines over the right-of-way over the lands so described, for the purpose of removing from lands beyond those described, deposits of clay belonging to the Borden Brick and Tile Company, and conveying this clay to their brick kilns near the city of Goldsboro; and defendant further has used and does use this narrow-gauge tramroad for the purpose of hauling lumbers to their clay holes, and has occasionally hauled brick to some individuals along the right-of-way; and for the purpose of hauling wood and rails to the brick kilns of the defendant.

8. That on 15 December, 1911, Daniel Grady died, leaving surviving him certain heirs, among whom is the plaintiff, L. B. Grady; that to L. B. Grady has been allotted a portion of the lands described in Exhibit 'A' attached to this judgment. That across the tract of land so allotted to L. B. Grady, extends the right-of-way, on which the Virginia Lumber and Box Company constructed their tramway, and which right-of-way the Virginia Lumber and Box Company conveyed, by the paper-writing described in Exhibit 'B,' to the Borden Brick and Tile Company.

9. That the Borden Brick and Tile Company is operating its tramroad across the land so allotted to L. B. Grady. That the right-of-way referred to extends across these lands. That this action was instituted for the purpose of restraining the defendant from further use of said right-of-way, and for having the right-of-way declared the lands of the plaintiff, L. B. Grady.

10. It is agreed that the plaintiff's right to damage is to be determined after the court has rendered a judgment as to the right to the title and possession of this right-of-way.

Conclusions of law by the court:

Upon the foregoing statement of facts, the court being of the opinion that the Virginia Lumber and Box Company acquired a permanent right-of-way across the lands described in the timber deed above referred to, and that it had a right to convey said right-of-way to the defendant, the Borden Brick and Tile Company, and that the Borden Brick and Tile Company is now the owner of said right-of-way and entitled to continue its use of the same:

It is now, therefore, considered, ordered and adjudged that the said defendant, the Borden Brick and Tile Company, is the owner of the permanent right-of-way described in the timber deed from Daniel Grady and wife, to the Virginia Lumber and Box Company, referred to in the above statement of facts, and that, therefore, the plaintiffs are not entitled to the relief prayed for in the complaint.

Upon this conclusion, it is further considered, ordered and adjudged that this action be dismissed and the plaintiffs pay the costs to be taxed by the clerk."

Exhibit "A," attached to the foregoing judgment is a deed, dated 28 January, 1911, by which Daniel Grady and his wife, Julia Grady, for and in consideration of the sum of $700, paid to them by the Virginia Lumber and Box Company, the receipt of which is therein acknowledged, conveyed to said Virginia Lumber and Box Company, its successors or assigns, certain trees upon the tract of land described in said deed, and certain rights and privileges therein set out. The third paragraph of said deed is in words as follows:

"Third. That the party of the second part, its successors, assigns, shall have exclusive right and privileges, including the rights of ingress and egress to and from said lands as well as the lands hereinafter mentioned, and are hereby authorized to construct such buildings, roads, tramroads, railroads, etc., as they may deem necessary or convenient, on, over, and across said lands, and any other lands owned by parties of the first part, or either of them, and to maintain and operate same for the purpose of removing the trees herein conveyed, and any other timbers and trees now owned, or which may hereafter be acquired on other lands by the party of the second part, its successors, assigns, to use smaller trees, undergrowth and dirt for the construction, maintenance and operation of said buildings, roads, tramroads, railroads, etc., and to remove, without notice, such buildings, roads, tramroads, railroads, etc., at any time. And the right herein granted shall include a permanent right-of-way sixty feet wide across said lands and any other lands owned by the parties of the first part, or either of them, the location to be selected by the party of the second part, its successors, assigns, for a main railroad, as well as any branch roads, now or hereafter planned."

Exhibit "B," attached to said judgment, is a deed, dated 17 April, 1928, by which the Virginia Lumber and Box Company, for and in consideration of the sum of ten dollars and other valuable considerations, the receipt of which is therein acknowledged, conveyed to the Borden Brick and Tile Company, its successors and assigns, "all of its right, title, interest and estate in and to the land, easement, rights and privileges described and defined in certain deeds heretofore executed and delivered to the Virginia Lumber and Box Company, which deeds are more fully described as follows:

. . . .

"11. Deed from Daniel Grady and wife, dated 28 January, 1911, which is recorded in the office of the register of deeds for Wayne County, in Book 103 at page 460."

From the judgment rendered, plaintiffs appealed to the Supreme Court.

J. Faison Thomson for plaintiffs.
Langston, Allen & Taylor for defendant.

CONNOR, J. By their deed dated 28 January, 1911, and duly recorded in Wayne County on 31 January, 1911, Daniel Grady and his wife conveyed to the Virginia Lumber and Box Company, its successors or assigns, not only the trees on the land described therein, but also certain rights and privileges with respect to said land, which are fully set out therein. The consideration for said conveyance was $700. It does not appear from the recitals in the deed that this consideration was paid solely for the conveyance of the trees and the rights and privileges necessary for the cutting and removal of said trees from the land. It was paid not only for the conveyance of the trees and said rights and privileges, but also for the trees and all the rights and privileges set out in the deed with respect to the land on which the trees were standing and growing. The language used by the grantors in said deed is so plain and their intention so clearly expressed, that there is no room for construction. *Hinton v. Vinson,* 180 N. C., 393, 108 S. E., 897. The rights and privileges conveyed by the deed, are (1) to construct over and across the land described in said deed, roads, tramways and railroads, and to use the same for the purpose of removing the trees conveyed by the deed, as well as other trees owned by the grantee, its successors or assigns, on other lands; and (2) to locate on said land a right-of-way, sixty feet wide, for a main railroad as well as any branch road planned by the grantee, its successors or assigns, at the date of the deed or thereafter and to use said right-of-way, permanently, for said purpose. *Hughes v. R. R.,* 119 N. C., 688, 23 S. E., 717. The right to construct roads, tramways and railroads over and across said land, for the purpose of removing trees from said land, or other lands, expired, necessarily, when the right to cut and remove said trees expired. The right, however, to use the right-of-way to be located by the grantee, its successors or assigns, for a main railroad, or a branch road, is permanent. This latter right was conveyed by the Virginia Lumber and Box Company to the defendant, Borden Brick and Tile Company. The defendant is now by virtue of the conveyance to it by the Virginia Lumber and Box Company, the owner of all the rights and privileges with respect to the land owned by plaintiffs, which were conveyed by Daniel Grady and wife to the Virginia Lumber and Box Company and owned by said company at the date of its deed to the defendant. These include the right to locate and use permanently for a main railroad or a branch road a right-of-way over and across the land of the plaintiff.

The fact that neither the Virginia Lumber and Box Company nor the Borden Brick and Tile Company is now or ever has been authorized to engage in or carry on the business of a common carrier by railroad, under the law of this State, is immaterial. A corporation organized under the laws of this State, with no power in its charter or otherwise to engage in or carry on the business of a common carrier, has no capacity to take and use an easement for that purpose. *Beasley v. R. R.*, 145 N. C., 272, 59 S. E., 60. It does not follow from this principle, however, that such corporation may not acquire by deed a right-of-way for the purpose of constructing and maintaining thereon a railroad for its private use. In the instant case, it is apparent that a railroad operated by it in the conduct of its own business, is a convenience, if not a necessity, for the defendant. We find no error in the judgment. It is

Affirmed.

RONALD GREEN v. CITY OF ASHEVILLE.

(Filed 1 October, 1930.)

1. **Municipal Corporations K d—Under the facts of this case city annexing entire incorporated town had the right to levy tax on property therein.**

Where under provision of statute the boundaries of a city are enlarged to include an entire incorporated town whose charter is thereby repealed, and the city assumes all of the outstanding obligations of the town and succeeds to all of its assets, revenues, taxes, assessments, etc., the obligations of the town are not extinguished by the repeal of its charter, and under constitutional mandate the means for their enforcement must not be impaired, and the city assuming the burden thereof is entitled to all the remedies of the town then available for enforcing its outstanding engagements, and where the property of a resident of the town has been listed for taxation during May preceding the town's annexation in June, and the property owner has paid no taxes to the town for the year for which his property was thus listed, the city annexing such town and succeeding to its tax list has the power to levy an *ad valorem* tax on the property, and the levy is not objectionable on the ground that the property was not within the boundaries of the city when the situs of the property was fixed for the ensuing year. *Reynolds v. Asheville, ante,* 212, cited and distinguished.

2. **Constitutional Law E b—In this case held: to relieve resident of annexed town from taxation would impair means of enforcing town's obligations.**

Ordinarily, the obligation of a contract is coeval with the undertaking to perform, and includes all the means which, at the time of its making, the law afforded for its enforcement, and where a city annexes an entire incorporated town and assumes its outstanding indebtedness, the property of the residents of the town may not be relieved of taxation for that year without lessening the means provided by law for the enforcement of the engagements of the town.

APPEAL by plaintiff from *Oglesby, J.,* at August Term, 1930, of BUNCOMBE.

Controversy without action submitted on an agreed statement of facts, which, so far as essential to a proper understanding of the legal questions involved, may be abridged and stated as follows:

1. Chapter 205, Private Laws 1929, provided that, subject to an election to be held on 30 April, 1929, which was held and carried, the boundaries of the city of Asheville were to be extended so as to take in additional territory, some incorporated and some not.

2. By the terms of said act, the date of extension was deferred until 30 June following.

3. Prior to and at all times during the year 1929, the plaintiff owned real and personal property located in the town of Kenilworth, a municipal corporation duly created by act of Assembly, the entire territory of which was included within the new boundaries of the city of Asheville as set forth in the said extension act.

4. Section 7 of said extension act is, in part, as follows: "That if the corporate limits of the city of Asheville are extended as herein provided, the city of Asheville shall assume all the valid and subsisting outstanding bonded indebtedness and other liabilities incurred for necessary expenses of the incorporated towns of Kenilworth, Biltmore, South Biltmore, and the city of Asheville shall succeed to all the assets, revenues, taxes, assessments, real and personal properties of said municipal corporations. This act shall operate as a repeal of the charters of any municipal corporation, other than the city of Asheville, the entire territory of which has been embraced within the extended limits of the city of Asheville by virtue of this act."

5. Section 11 provides: "That if the corporate limits of the city of Asheville be extended by said election as herein provided, it shall be the duty of the governing bodies of the municipal corporations included in the corporate limits of the city of Asheville as extended, to turn over to the city of Asheville all official books, deeds, records, moneys and other assets, including all of its real and personal property, and the same shall thenceforth become the property of the city of Asheville."

6. On 30 June, 1929, the town of Kenilworth had an outstanding valid and subsisting bonded indebtedness of $388,700; notes outstanding in the sum of $28,250, as well as other liabilities, all incurred for necessary municipal expenses.

7. During the month of May, 1929, plaintiff duly listed and returned for taxation his said property then and there situated in the town of Kenilworth and then and there subject to taxation by the town of Kenilworth, and said tax return was filed with the duly constituted authorities of Buncombe County, North Carolina, in the manner provided by law and thereafter and by reason thereof plaintiff became indebted to the town of Kenilworth for and during the tax year 1929 as a property owner and taxpayer residing within said town in such amount and to such extent as the properly constituted authorities of said town might duly determine by an assessment upon said plaintiff's property thereafter to be made in the manner provided by law.

8. As soon as available, all tax lists of Buncombe County which relate to property and polls within the city of Asheville, are furnished to the city as its own tax lists.

9. On 8 October, 1929, the board of commissioners of the city of Asheville duly passed a tax ordinance, levying an *ad valorem* tax of $1.62 on each $100 valuation of property, and endorsed the tax lists, prepared in conformity with said ordinance, so as to affect all taxable property within the city, including that annexed under the extension act aforesaid.

10. The rate of *ad valorem* tax levied by the town of Kenilworth prior to its inclusion within the boundaries of the city of Asheville was $1.50 on each $100 valuation of property.

The plaintiff contends that as his property was not within the corporate limits of the city of Asheville on 1 May, 1929, when the situs of taxable property was fixed by law for the ensuing year, and did not come within such limits until 30 June thereafter, the city was without power on 8 October, 1929, to levy a valid *ad valorem* tax on his property prior to the tax year 1930.

The defendant, on the other hand, contends that the tax in question is in all respects legal and valid.

From a judgment upholding the tax, the plaintiff appeals, assigning error.

J. Scroop Styles for plaintiff.
George Pennel, Chas. N. Malone and Chas. Earl Jones for defendant.

STACY, C. J. The plaintiff rests his case entirely upon the decision in *Reynolds v. Asheville, ante,* 212. But the two cases are controlled by different principles and are readily distinguishable: Firstly, on the ground that the plaintiff in the Reynolds suit lived in the town of Biltmore Forest, only a portion of which was included within the new boundaries of the city of Asheville, and had paid his municipal taxes to the town of Biltmore Forest for the year 1929, while the plaintiff in the instant case lives in what was formerly the town of Kenilworth and has paid no municipal taxes at all for the year 1929; and, secondly, because the charter of the town of Kenilworth has been repealed, with the city of Asheville assuming all of its outstanding obligations and succeeding to all of its assets, revenues, taxes, assessments, etc., while the charter of the town of Biltmore Forest was not repealed by the act in question, but remained existent.

In other words, the plaintiff in the *Reynolds case,* having paid an *ad valorem* tax to the town of Biltmore Forest for the year 1929, sought to enjoin, and did restrain, the city of Asheville from levying and collecting another tax on the same property for the same year, while the plaintiff, in the instant case, though living in the town of Kenilworth for a part of the year and thereafter in the city of Asheville, has paid no municipal taxes at all for the year 1929, and is seeking to escape all such taxes. To try to avoid a double tax is one thing; to seek to escape all taxation is quite another. The charter of the town of Kenilworth has been repealed, and the city of Asheville alone may act in the matter. *Watson v. Commissioners,* 82 N. C., 17; 19 R. C. L., 733.

Another distinguishing feature between the two cases is, that the town of Kenilworth was heavily indebted, with bonds and notes outstanding, at the time of its incorporation into the city of Asheville, which would seem to call for an application of the principles announced in *Broadfoot v. Fayetteville,* 124 N. C., 478, 32 S. E., 804 (as stated in the first three headnotes):

"1. Debts due from a municipal corporation are not extinguished by the repeal of its charter, and still exists, notwithstanding that repeal.

"2. When the old charter is repealed and a new one is granted, in which latter are bestowed by law all the benefits and property of the old, the burden of the old must be borne by the new; where the benefits are taken, the burdens are assumed.

"3. The city of Fayetteville is the successor of the town of Fayetteville, and liable for its debts, and the remedies for the enforcement of them, existing when the contract was made, must be left unimpaired by the Legislature, unless a substantial equivalent is provided."

The translation of all municipal powers and properties of the town of Kenilworth to the city of Asheville and the assumption by the latter of all the outstanding obligations and liabilities of the former, in order to conform to the constitutional provision against "impairing the obligation of contracts," would necessarily carry with it the means and assurances then available for the enforcement of the outstanding engagements of the town of Kenilworth, unless some just equivalent were substituted therefor. *Broadfoot v. Fayetteville, supra; Spitzer v. Commissioners,* 188 N. C., 30, 123 S. E., 636; *Hammond v. McRae,* 182 N. C., 747, 110 S. E., 102; *Smith v. Commissioners,* 182 N. C., 149, 108 S. E., 443; *Port of Mobile v. Watson,* 116 U. S., 289; *Merriwether v. Garrett,* 102 U. S., 472; *City of Galena v. Amy,* 5 Wall., 705; *State ex rel. Johnson v. Goodgame,* 91 Fla., 871, 108 So., 836, 47 A. L. R., 118, and note.

To release the plaintiff's property from taxes for the year 1929, without providing a just equivalent therefor, would, to this extent, lessen the means, provided by law, for the enforcement of the engagements of the town of Kenilworth at the time of their making. *Nelson v. St. Martin's Parish,* 111 U. S., 716. Ordinarily, it may be said that the obligation of a contract is coeval with the undertaking to perform, and includes all the means which, at the time of the making of the contract, the law afforded for its enforcement. 6 R. C. L., 324. And as the prohibition against the impairment of the obligation of contracts is absolute, the amount and extent of such impairment is not material. *Farrington v. Tenn.,* 95 U. S., 679.

Moreover, there is a presumption against an interpretation that will render a law invalid. *Hammond v. McRae, supra;* Black on Interpretation of Laws, 89. Indeed, section 13 of the act in question provides: "That nothing contained in this act shall be construed as in any manner impairing the legal obligations of any of the municipal corporations or water and sewer districts included in the area hereinbefore described, but all such legal obligations shall remain in full force and virtue."

As no reversible error has been made to appear on the record, the judgment will be upheld.

Affirmed.

E. F. PRESSLEY v. CITY OF ASHEVILLE.

(Filed 1 October, 1930.)

APPEAL by plaintiff from *Oglesby, J.,* at August Term, 1930, of BUNCOMBE.

Controversy without action submitted on an agreed statement of facts.

From a judgment against the plaintiff he appeals.

J. Scroop Styles for plaintiff.

George Pennel, Chas. N. Malone and Chas. Earl Jones for defendant.

STACY, C. J. This is a companion case to *Green v. Asheville, ante,* 516, and is controlled by the decision in that case, the only difference being that in the instant case the plaintiff resides in what was formerly the town of South Biltmore, while the plaintiff in the *Green case* resides in what was formerly the town of Kenilworth. The charters of both towns, South Biltmore and Kenilworth, were repealed by the extension act in question, and the city of Asheville assumed all the valid outstanding obligations and liabilities of both towns and succeeded to all of their assets, revenues, taxes, assessments, etc.

Affirmed.

LLOYD JARRETT v. CITY OF ASHEVILLE.

(Filed 1 October, 1930.)

APPEAL by plaintiff from *Oglesby, J.*, at August Term, 1930, of BUNCOMBE.

Controversy without action submitted on an agreed statement of facts. From a judgment against the plaintiff he appeals.

J. Scroop Styles for plaintiff.

George Pennel, Chas. N. Malone and Chas. Earl Jones for defendant.

STACY, C. J. This is a companion case to *Green v. Asheville, ante,* 516, and is controlled by what was said in that case, the only distinguishment in the fact situations of the two cases being that in the present case the plaintiff resides in what was formerly the town of Biltmore, while the plaintiff in the *Green case* resides in what was formerly the town of Kenilworth. The charters of both towns, Biltmore and Kenilworth, were repealed by the Greater Asheville Extension Act, and the city of Asheville thereupon assumed all outstanding obligations and liabilities of said towns and succeeded to all their assets, revenues, taxes, assessments, etc.

Affirmed.

SUDIE M. PAUL ET AL. v. GLADYS PAUL ET AL.

(Filed 1 October, 1930.)

1. **Deeds and Conveyances C c—Deed in this case held to convey fee tail special which is converted into fee simple by C. S., 1734.**

   Where a deed is executed to "M. and the heirs of her body by her husband S. begotten, or upon failure thereafter her death to the nearest heirs of S.," and at the date of the execution of the deed M. has children living: *Held*, the deed conveys a fee tail special to M. which is converted to a fee simple by C. S., 1734, defeasible upon her dying without surviving children by S., and her children do not take as tenants in common with her, C. S., 1739, providing that a limitation to the heirs of a living person shall be construed to be to the children of such person, being applicable only when there is no precedent estate conveyed to the living person, and the condition as to the failure of heirs referring to the death of M. without surviving children and not to the birth of issue, there being issue born at the date of the execution of the deed, and the ulterior limitation is not barred by the birth of such issue. *Sharpe v. Brown*, 177 N. C., 294, cited and distinguished.

2. **Deeds and Conveyances C a—General rules for construction of deeds.**

   In construing a deed such a construction should be given as is most agreeable to the intent of the grantor as expressed in instrument, and technical rules of construction serve only as aids to this end, the meaning of the deed depending largely upon the circumstances of the grantor as they appear in the deed itself.

APPEAL by defendant S. E. McCotter and wife, from *Nunn, J.*, at May Term, 1930, of PAMLICO. Reversed.

The plaintiffs brought a special proceeding for the partition of land and the defendants, S. E. McCotter and wife, filed an answer denying that the plaintiffs have any title, and in effect pleading sole seizin. It appears from the facts found by the trial court that on 1 June, 1905, John F. Paul executed and delivered to Mattie Paul a deed in which for a consideration of $3,000 he conveyed "to said Mattie Paul and the heirs of her body by Smith Paul begotten, or upon failure thereafter her death to the nearest heirs of Smith Paul, a certain tract or parcel of land in Pamlico County," containing fifty acres. The habendum is "to the said Mattie Paul, aforesaid heirs, and assigns," and the covenants were made with "said Mattie Paul, aforesaid heirs and assigns."

On 1 June, 1921, Mattie Paul and her husband Smith Paul gave their note to the Bank of Pamlico for $1,945.50, and secured it by a deed of trust with warranty of title to J. S. Weskett, as trustee. The deed of trust was foreclosed on 22 October, 1927, and the defendant, Estelle McCotter became the purchaser at the price of $1,900 and received a deed from the trustee purporting to pass the title in fee.

On 15 March, 1928, McCotter and his wife brought suit in ejectment against Smith Paul and wife to recover possession of the land and the latter, admitting their execution of the deed of trust and the sale thereunder, defended on the ground that the deed of trust conveyed only an undivided one-eleventh interest in the land, and that the ten children born of the marriage of Smith Paul and Mattie Paul were tenants in common with their mother. They asked that the children be made parties, and the land divided into eleven equal shares. The judge before whom that action was tried held that the children had no interest in the land and refused to make them parties; but the survivors, excepting one who is a defendant, afterwards instituted this proceeding.

When John F. Paul made the deed to Mattie Paul, she had two living children by her husband, Smith Paul, and within ten lunar months thereafter another child, the defendant, Gladys P. Paul, was born to them. Mattie Paul and Smith Paul, her husband, are living.

Upon the facts as found it was adjudged that the three children last named have, each, an undivided one-fourth interest in the land in fee simple; that Mattie Paul has an undivided one-fourth interest for life, with remainder after her death to the heirs of her body by Smith Paul; if any, and if none then to the heirs of Smith Paul; and Estelle McCotter is the owner of the life estate of Mattie Paul; and that the interest of Reginald Paul (who was living when Mattie Paul received her deed and who died 11 August, 1920), descended to his heirs. Commissioners were appointed to make partition as adjudged.

The defendants McCotter and wife excepted and appealed.

Z. V. Rawls for appellants.
F. C. Brinson and D. L. Ward for appellees.

ADAMS, J. The judge presiding at the trial was of opinion that John F. Paul's deed conveyed the land in controversy to Mattie Paul and the children living and *in esse* as tenants in common. This would have been correct if the deed had been made to Mattie Paul and her children. *Tate v. Amos,* 197 N. C., 161. But it was executed "to Mattie Paul and the heirs of her body by Smith Paul begotten." The estate thus created was under the old law a fee tail special (2 Bl., 113), which our statute enlarges into a fee simple. C. S., 1734. The law is clearly stated in *Revis v. Murphy,* 172 N. C., 579, and *Jones v. Ragsdale,* 141 N. C., 200. In the last case the conveyance was "to Zilphia S. Jones and her heirs by her present husband"; and at the time the deed was executed they had one living child. It was held that Zilphia and her child were not tenants in common, the statute (C. S., 1739) providing that a limitation to the heirs of a living person shall be construed to be the children of such person, being applicable only when there is no precedent estate conveyed to the living person. *Marsh v. Griffin,* 136 N. C., 334.

As that part of the deed set out above vests in Mattie Paul an estate in fee, the next question relates to the effect of the succeeding clause, "or upon failure thereafter her death to the nearest heirs of Smith Paul."

This inartificial language reminds us that, as said by *Lord Chief Justice Wills,* such a construction should be made of the words of a deed as is most agreeable to the intention of the maker, because "words are not the principal thing in a deed, but the intent and design of the grantor." *Cobb v. Hines,* 44 N. C., 343, 349. The intent must be such as is expressed in the deed and not such as may have existed in the grantor's mind if inconsistent with the language he used. *McIver v. McKinney,* 184 N. C., 393; *West v. Murphy,* 197 N. C., 488. Technical rules of construction serve only as aids to this end, because the meaning of the deed depends largely upon the circumstances of the grantor as they appear in the deed itself.

The maker of the deed had in mind an ulterior limitation—"upon failure." Upon failure of whom? Evidently of "the heirs of her body by Smith Paul begotten." The failure referred to is not the failure of the birth of issue; for Mattie and Smith Paul had two living children when the deed was executed. This fact, if no other, excludes the application of the principle stated in *Sharpe v. Brown,* 177 N. C., 294. There the conveyance, which was executed on 30 December, 1893, was "to Margaret Wellons Stroud, and to the heirs of her own body, if she never have any heirs of her own body, then in that event she never does have any, then it is to go to M. M. Stroud and T. W. Stroud their life, and then to their children." Margaret intermarried with R. C. Sharpe in 1915 and in 1917 a child was born of the marriage. It was held that the grantee took an estate tail, converted into a fee, and that the birth of issue defeated the limitation over. The principle was applied in *Bank v. Murray,* 175 N. C., 64.

It is manifest, we think, that the grantor did not intend that the ulterior limitation should be barred by the birth of issue, for the reason, as stated, that there were living children born of the marriage when the deed was executed. The failure of bodily heirs must therefore refer to a later period—that is, the death of Mattie Paul. We construe the deed as expressing an intention to convey the land to Mattie Paul and the heirs of her body by Smith Paul begotten, and upon the failure thereof (of such issue) living at her death to the nearest heirs of Smith Paul. By this construction Mattie Paul took an estate in fee simple, defeasible upon her dying without bodily heirs by Smith Paul, living at her death; and as Estelle McCotter acquired the title of Mattie Paul the plaintiffs have no interest in the land and cannot maintain the present action. *Willis v. Trust Co.,* 183 N. C., 267; *Williams v. Blizzard,* 176 N. C., 146; *Sessoms v. Sessoms,* 144 N. C., 121; *Smith v. Brisson,* 90 N. C., 284.

Judgment reversed.

L. T. LIGHTNER v. KNIGHTS OF KING SOLOMON AND ROSA ARMWOOD.

(Filed 8 October, 1930.)

Estoppel C b—Defendant insurer held estopped in this case from setting up defense that insured fraudulently misrepresented her age.

Where, upon the death of the insured, a fraternal insurance lodge delivered by its secretary its check in payment of a policy to the beneficiary, and in his presence the beneficiary endorses it over to the undertaker in payment of services rendered by him in burying the deceased insured, and the difference in cash is paid by underetaker, and the insurer stops payment of the check at the bank upon the ground that the insured was over the age allowed by the insurer's constitution: *Held*, the knowledge of the secretary of the insurer of the age of the insured at the time of the transactions will estop the insurer from maintaining as against the undertaker acquiring the check for full value that the policy was void for fraudulent representations as to the age of the insured in her application for the policy, and in an action by the undertaker on the check a directed verdict in his favor is proper, and *held further*, the receipt by the insurer of premiums from the insured for seven years without questioning her age indicated negligence.

APPEAL by defendant, Knights of King Solomon, from *Small, J.*, and a jury, at January Term, 1930, of WAYNE. No error.

The issues submitted to the jury and their answers thereto were as follows:

"1. In what amount is the defendant, Knights of King Solomon, indebted to the plaintiff on account of the check sued on in this cause? Answer: $326.50, with interest at 6 per cent from 16 March, 1928.

2. In what amount is the defendant, Rosa Armwood, indebted to the plaintiff on account of her endorsement of the said check? Answer: $326.50, with interest from 16 March, 1928."

The court below charged the jury as follows: "Gentlemen of the jury, upon the conclusion of all the testimony, and after due consideration by the court, the court has come to the conclusion that the plaintiff is entitled to a preëmptory instruction; therefore, the court instructs you that if you believe all the testimony and find the facts to be as testified to, and so find them to be true by the greater weight of the evidence, it would be your duty to answer the first issue $326.50, with interest from 16 March, 1928. (If you gentlemen can't remember this, you may take it down on a piece of paper, $326.50 with interest from 16 March, 1928, and answer the second issue, $326.50, with interest from 16 March, 1928.)" To the latter part of this charge in brackets the defendant, Knights of King Solomon, excepted and assigned error.

Judgment was rendered on the verdict. Defendant, Knights of King Solomon, made numerous exceptions and assignments of error, and appealed to the Supreme Court. The material assignments of error and necessary facts will be set forth in the opinion.

Langston, Allen & Taylor for plaintiff.
J. Faison Thomson for defendant, Knights of King Solomon.

CLARKSON, J. The defendant, Knights of King Solomon, issued two policies on the life of Emma Watson, the beneficiary was Rosa Armwood, her daughter. One was for $200, and the other for $125.00—total $325.00. Notice of death to the Grand Lodge, Knights of King Solomon, stated that Emma Watson died on 14 December, 1927, and was initiated in 1919; "this member was paid up at death," and that "the age of the deceased was 56 years." This was signed by L. W. Williams, H. P. (High Priest), and Amos Artis, Secretary. This notice was sworn to and subscribed to by said officials.

C. F. Rich, head of the Endowment Department and secretary, issued a voucher and had a check made payable to Rosa Armwood, the beneficiary, for $325, on 9 March, 1928. On the face of the check was the following: "Death benefits on life of Emma Watson." Plaintiff is a funeral director, and buried Emma Watson. Rosa Armwood, on 24 December, 1927, transferred and assigned her rights in the insurance to the amount of $196.50, due by her for burying her mother, to the plaintiff and authorized the secretary of the Knights of King Solomon Lodge, Amos Artis, to pay over the above-mentioned amount to plaintiff.

The constitution of the Knights of King Solomon contained the following: (a) No person shall be initiated in this Lodge, under 18 years of age or over 55 years of age, who is not of good moral character, sound in mind and body, producing a physician's certificate of that fact, and a believer in the Supreme Being.—(c) Ages must be correctly stated in application, and any false statement of age, either in application or death proof, shall entitle the beneficiary to amount paid in only, plus 6 per cent interest. (d) The full amount of $150 shall be the total insurance due on all members of the order who joined over 50 years of age, and the return of premiums, plus 6 per cent interest on all who joined over 55 years of age."

The Mutual Benefit Certificate on the life of Emma Watson contained the following: "3. If the material representations in application for insurance are false, no benefits will be paid. If the age is incorrectly given, the benefits to be paid will be adjusted to correspond with correct age."

It was contended by defendant, Knights of King Solomon, that Emma Watson was over the age of 55 when the policies were issued. That plaintiff and the beneficiary, Rosa Armwood, with this knowledge conspired to defraud the defendant, Knights of King Solomon, and obtain $325—more than the policy allowed in such cases. The plaintiff denied this. Rosa Armwood, a witness for defendant, was asked: "Did you tell a story about your mother's age? Answer: No, sir. Q. To get this check from the company? Answer: No, sir, because I don't know mama's age. Q. Did you agree with Lightner—did you and Lightner get together and agree to tell a story about her age? Answer: No, sir, I was not in the room when it was set down."

In the answer of defendant we find the following: "That, not until after the death of Emma Watson, and not until 14 December, 1927, did this defendant discover the fraud that was attempted to be perpetrated on it."

C. F. Rich, endowment secretary, testified for defendant, and on cross-examination by plaintiff, is the following: "Q. You swore at that time that you knew what you did know about it three months before this check was issued, didn't you? Answer: No, sir. Q. Isn't that what it says? Answer: Yes, sir, that is true. Q. That is what you swore to? Answer: Yes, sir."

It was in evidence that after the voucher was issued by C. F. Rich, head of the endowment department and secretary, the check was received by Amos Artis, secretary of the lodge. Artis testified: "Nothing was said about the woman being too old to recover the insurance. Nobody mentioned her age at all. I never heard Lightner say anything about her age. . . . I delivered it to Rosa to be endorsed by her on account of Lightner's assignment. All of that was approved by me."

When the check was turned over to Rosa Armwood, Artis was present. Rosa Armwood endorsed the check to plaintiff. The check was for $325. Plaintiff had theretofore advanced $196. Plaintiff testified: "With the secretary of the local lodge, I went, with the check, to Rosa Armwood's house. She owed me $196, according to the assignment, so we took the check over, and I gave her $128.50 cash money out of my pocket, as the difference between the burial expenses and the check. She endorsed the check, and this is it. I then took the check to the bank and deposited it. After a while the check came back, saying that payment had been stopped on it, including a protest fee of $1.50. I paid $326.50 and took the check up from the bank. I demanded the money of Rosa Armwood, and also wrote the head lodge about it.

Rosa Armwood, a witness for defendant, testified: "When the check came, on 10 March, Amos Artis brought it to my house. He was secretary of the local lodge of the Knights of King Solomon. The check had been sent to him by the insurance department to be delivered to Rosa Armwood, and not to Lightner. I endorsed the check because Lightner would not let me get my hands on it unless I did endorse it. He gave me $128.50. The check represented insurance on my mother. I told Lightner that I did not know my mother's age. I told Lightner that I did not know how old mama was when she went into the lodge."

From the record it appears that Rich, the head of the endowment department and secretary, issued the voucher with knowledge that Emma Watson was over age, and Artis, secretary of the local lodge, received the check and turned it over to Rosa Armwood, who endorsed it to plaintiff in Artis' presence. Plaintiff paid full value for it and deposited it in the bank. After this was done, although Rich in the answer swears that on 14 December, 1927, he knew that Emma Watson was over age, the check was issued by him and after being issued he then claims that he discovered that Emma Watson's age was beyond the policy limit to receive $325, under the constitution of the defendant, the Knights of King Solomon. He then stopped payment of the check after plaintiff had purchased it for full value and without notice. From the record, we see no evidence of fraud on plaintiff's part; he paid full value for the check, without knowledge as to the age of Emma Watson. Then again, defendant, Knights of King Solomon, received premiums for some seven years from Emma Watson, without questioning her age. This indicates negligence.

From the record, we think the charge of the court below correct. The motions made by defendant for judgment as in case of nonsuit (C. S., 567), were properly overruled. The other assignments of error as to exclusion of evidence, and the refusal to tender the issues submitted by defendant, from the view we take of this action, are not material. The exception to the court below instructing the jury, "If you, gentlemen, can't remember this, you may take it down on a piece of paper," etc., is not material or prejudicial.

We think from the record that defendant, Knights of King Solomon, is estopped on all the facts in this action.

The principle is thus stated in *Bank v. Winder,* 198 N. C., at p. 21, citing numerous authorities: "Where the owner of personal property clothes another with the *indicia* of title, or allows him to appear as the owner, or as having the power of disposition, an innocent third party dealing with the apparent owner will be protected." *Bank v. Liles,* 197 N. C., 413; *Bank v. Clark,* 198 N. C., 169.

There are errors as to certain dates in the record, which are not material. In the judgment we find

No error.

PHILIP KOHN v. THE CITY OF ELIZABETH CITY.

(Filed 8 October, 1930.)

Taxation B c—In this case held: plaintiff was entitled to recover amount paid under protest as municipal license tax.

Where the charter of a city provides for the raising of revenue by license taxes on certain trades, professions, etc., among which is specified "merchants, itinerants or dealers, selling bankrupt or fire sales of any kind of goods," etc., a merchant purchasing a bankrupt stock, and increasing it by the purchase of other stock, and remaining in business for a period of over a year, during which time the bankrupt stock is sold in the usual course of business, is not liable for the tax imposed upon those selling bankrupt stock and is entitled to recover an amount paid by him thereunder under protest, the merchant not being subject to the tax if valid, and being entitled to recover if the tax is invalid. The construction of the statute, upon which may depend its validity, is not necessary to be decided in this case.

STACY, C. J., concurring; CLARKSON, J., concurs in concurring opinion.

APPEAL by defendant from *Nunn, J.*, at June Term, 1930, of PASQUOTANK. Affirmed.

This action to recover the sum of $466.66 and interest, paid by plaintiff to defendant, under protest, as taxes unlawfully demanded and collected by defendant, was heard on a statement of facts agreed, which is as follows:

"1. That chapter 15 of the Private Laws of 1923, same being the charter of the city of Elizabeth City, contains the following provisions:

'Revenue Act. Section 1. That to raise funds for general municipal purposes the following license taxes hereinafter specified are hereby levied for the privilege of carrying on the businesses, trades, professions, callings, occupations, or doing the act named, within the corporate limits of the city of Elizabeth City, or within one-half mile thereof, from the first day of September, 1923, to the thirty-first day of August, 1924, and for each year thereafter unless for some other time or period herein specified; and all such taxes shall be due and payable in advance at the office of the city auditor. The payment of any particular tax herein imposed, shall not relieve the party paying the same from liability for any other tax specifically imposed for any other business conducted by such person.'

Among the license taxes specified was the following, on: 'Merchants, itinerants or dealers, as proprietor or agent, selling bankrupt or fire sales of any kind of goods, wares or merchandise, per week, $100.'

2. That on or about 20 October, 1927, the said Philip Kohn purchased the stock of merchandise formerly owned by O. F. Gilbert, of

Elizabeth City, N. C., the said Gilbert having theretofore been adjudged a bankrupt, and the said Kohn having purchased said stock from the trustee in bankruptcy.

3. That the said Kohn rented a store on the west side of North Poindexter Street, Elizabeth City, N. C., and being one of the stores formerly occupied by said O. F. Gilbert, placed therein the merchandise bought as aforesaid, advertised the same for sale as bankrupt stock, and actually sold the same in the usual course of business.

4. That a short time before the plaintiff began selling said stock, the defendant notified him that by virtue of the aforesaid provisions of the charter of defendant, the plaintiff would be required to pay a license tax for the privilege of conducting a bankrupt sale, or selling bankrupt stock, and on 20 October, 1927, required the plaintiff to pay to defendant $133.33; on 21 October, 1927, $100; on 11 November, 1927, $133.33; and on 21 November, 1927, $100, making a total of $466.66, all of which plaintiff paid, under protest.

5. That after the payments as aforesaid, plaintiff failed and refused to make any further payments on said tax, and was brought before the police justice at Elizabeth City, was tried and the action dismissed.

6. That plaintiff made legal demand upon the defendant for the return of the said $466.66, with which demand the defendant refused to comply.

7. That a short time prior to January, 1928, the plaintiff leased, for a period of one year, from Mr. P. G. Sawyer, the store in which plaintiff's stock of merchandise was then located, increased his stock, and remained in business until some time during the year 1929.

8. That on 3 May, 1928, plaintiff duly listed for taxation his stock of merchandise, the valuation being fixed at $9,200, and thereafter paid to the sheriff of Pasquotank County, and to the tax collector of defendant, the taxes against said stock.

9. That the city and county taxes on the bankrupt stock purchased by plaintiff, and which were due for the year 1927, were paid by the trustee of the estate of O. F. Gilbert, bankrupt."

On the foregoing statement of facts agreed, the plaintiff contended "that the imposition and collection of said tax was illegal and not justified or authorized and that the statute, as set forth in the charter of defendant, and under which the said tax was imposed and collected, is unconstitutional, and that the said sum of $466.66, together with interest from date of payment, should be refunded to the plaintiff by defendant."

The defendant contended "that the imposition and collection of said tax was just and proper, and that the statute, as set forth in the charter of defendant, and under which said tax was imposed and collected, is constitutional and valid."

The court was of opinion "that so much of said chapter 15 of the Private Laws of 1923, same being the charter of the city of Elizabeth City, as imposes a tax of $100 per week upon "merchants, itinerants or dealers, as proprietor or agent, selling bankrupt or fire sales of any kind of goods, wares or merchandise" is in suppression of trade, oppressive and is unconstitutional and void, and that the plaintiff is entitled to the relief prayed for."

From the judgment in accordance with the opinion of the court that plaintiff recover of the defendant the sum of $466.66, with interest thereon from 21 November, 1927, and the costs of the action, defendant appealed to the Supreme Court.

Worth & Horner for plaintiff.
Thompson & Wilson for defendant.

CONNOR, J. If the statute under which the taxes were levied, and paid by plaintiff to defendant, under protest, must be construed as imposing a privilege tax on merchants doing business in Elizabeth City, and subject to the tax imposed by subsection 17, section 140, chapter 15, Private Laws of North Carolina, 1925, who shall purchase from a trustee in bankruptcy, goods, wares, and merchandise, belonging to the estate of the bankrupt, and who thereafter sell same in Elizabeth City, in the usual course of business, as merchants, a grave question will be presented as to whether the statute is valid. So construed, the statute may be subject to the criticism that it imposes a tax in violation of the principle that classifications for the purpose of taxation must be based on real and substantial differences, and not upon arbitrary distinctions, having no just relation to the subject-matter.

If the tax is imposed by the statute only on persons, firms or corporations, whether residents of the city or itinerants, who sell therein bankrupt stocks, or stocks which have been damaged by fire, and who are not classified for purposes of taxation as merchants subject to a privilege tax graduated in accordance with the amount of their gross sales, per annum, it would seem that the statute is valid. So construed, the statute would not be in violation of well settled principles with respect to valid classifications. See section 121, chapter 345, Public Laws of North Carolina, 1929, which contains the following paragraph:

"(d). Every itinerant salesman or merchant who shall expose for sale, either on the street or in a house rented temporarily for that purpose, any goods, wares or merchandise, bankrupt stock or fire stock, not being a regular merchant in such county, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of transacting such business, and shall pay for such license a tax of one hundred dollars in each county in which he shall conduct or carry on such business."

Upon the facts agreed in the instant case, the question as to the proper construction of the statute, upon which may depend its validity does not necessarily arise. If the statute is void, the plaintiff is entitled to recover; if the statute is not void, but valid, then upon the facts agreed, we are of opinion that plaintiff was not subject to the tax imposed therein, and for that reason is entitled to recover. In either event, the judgment must be affirmed. It is so ordered.

Affirmed.

STACY, C. J., concurs in result on the ground that the facts agreed do not bring the plaintiff within the terms of the statute or charter in question, and thinks the reasons assigned by the trial court, in support of his judgment, should be disapproved in order to exclude a conclusion.

CLARKSON, J., concurs in concurring opinion.

W. T. HOBBS v. LEON A. MANN AND AGNES MANN.

(Filed 8 October, 1930.)

Highways B i—Evidence in this case held to permit deduction of inconsistent inferences and should have been submitted to the jury.

Where, in an action to recover damages resulting from an automobile collision on a public highway, there is evidence tending to show that the plaintiff drove to the right to avoid hitting a hog on the highway and that as he brought the right wheels of his car again on the hard surface he was hit by the defendant's car which had struck the hog, and there is no directly affirmative evidence that the defendant's car was deflected by striking the hog and unavoidably hurled against the plaintiff's car, and there is evidence from which the jury might infer that the defendant had failed to keep a safe distance behind the plaintiff's car in violation of The Code of 1927, sec. 2621(57), or that he had not observed the statutory requirements in attempting to pass the plaintiff in violation of section 2621(54): *Held*, inconsistent inferences may be deduced from the evidence and the case should have been submitted to the jury for determination as to whether the injury resulted from conditions which could not have been foreseen or from the negligence of the defendant.

CONNOR, J., dissents.

APPEAL by the plaintiff from *Grady, J.*, at April Term, 1930, of ONSLOW. New trial.

Dawson & Jones and S. H. Newberry for plaintiff.
No counsel contra.

ADAMS, J. The action was brought to recover damages for personal injury resulting from the collision of automobiles. At the close of the testimony offered by the plaintiff the trial court dismissed the action as in case of nonsuit, and the plaintiff appealed.

The rule applicable in cases of this kind is that if diverse inferences may reasonably be drawn from the evidence, some favorable to the plaintiff and others to the defendant, the cause should be submitted to the jury for final determination. The question, then, is this: Is the evidence, when construed most favorably for the plaintiff, sufficiently probative to justify a finding of fact which would constitute actionable negligence?

The testimony tends to establish the following circumstances: On the highway between Trenton and Kinston, W. M. Fonville was driving an open Ford touring car, the rear seat occupied by the plaintiff and Bill Bugg. "A good little distance" in front of the car a hog walked into the highway from an adjoining field. Fonville "blew his horn and drove to the right, two wheels of his car on the dirt, off the highway." When he had passed the hog, or "when the hog had passed him," he "gradually came back on the road and presently was struck by another car coming from the rear."

The offending car, a Nash coach, was occupied by the defendants, Mr. and Mrs. Mann. It was owned by the husband and was driven by the wife. After killing the hog and leaving the carcass "in the middle of the road" the Nash coach struck the Ford car "along about the front end, along against the front door," and "turned it over three times, so that when it stopped it had turned around and was headed back towards Trenton." The top was torn off; the steering wheel was broken; a fender was bent; the radiator was damaged; the battery was torn up; and the windshield was shattered.

The Ford was traveling at the rate of twelve or fifteen miles an hour; the speed of the Nash is not definitely fixed. Fonville testified, "It must have been going pretty fast by turning me over three times and turning me round like it did"; and the plaintiff said that when the impact occurred "Bugg went on me and I went on him, and then he went on me again, we were turning that fast." The Nash coach was stopped one hundred or one hundred and twenty-five yards from the wreck.

We presume the action was dismissed upon the theory that the evidence proves nothing more than an accident resulting from an unforeseeable collision of the Nash car with the intrepid swine. Upon the present testimony a jury might or might not reach this conclusion.

There is no directly affirmative testimony that the Nash car by striking the hog was deflected from its course and unavoidably hurled against the car in which the plaintiff was riding. We must, therefore, ascertain whether, with this question presently out of the way, there is any testimony from which a jury might reasonably find that the defendants were negligent.

While Fonville was in the act of bringing his right wheels from the shoulders of the road to the hard surface, the collision occurred. This in itself is a relevant circumstance, calling for explanation. The rear car was closely following the one in front. As soon as "the hog cleared the wheels of the Ford" the Nash coach struck the hog; the plaintiff said, "I don't reckon it was a quarter of a second."

The driver of a motor vehicle is forbidden to follow another vehicle more closely than is reasonable and prudent; he must have due regard to speed, traffic, and the safety of others; and his disregard of the statute may subject him to liability. Pub. Laws 1927, ch. 148, sec. 15; N. C. Code of 1927, sec. 2621(57). We are not prepared to say that there is no evidence from which a jury might infer that the defendants failed to observe these statutory requirements.

If the defendants were in the act of passing Fonville's car they should have complied with another statute. The driver of a motor vehicle overtaking another vehicle proceeding in the same direction shall pass at least two feet to the left of it and shall not again drive to the right side of the highway until safely clear of such overtaken vehicle; and before passing or attempting to pass shall give audible warning with his horn or other warning device. Public Laws 1927, ch. 148, sec. 12; N. C. Code, 1927, sec. 2621(54).

Whether the defendants were trying to pass the car in front of them and, if so, whether they ignored the provisions of the statute are questions which should have been submitted to the jury, for there is at least some evidence tending to support the plaintiff's contention that the defendants did not comply with either provision.

True, in some respects the plaintiff's own testimony is favorable to the defendants; but in others it is antagonistic. He suggests that the injury resulted from reckless driving rather than from the unexpected appearance of the hog.

Since inconsistent inferences may be deduced from the testimony appearing in the record we are of opinion that a jury should be allowed to determine whether the plaintiff's injury resulted from conditions which could not reasonably have been foreseen or from negligence in the operation of the defendants' car.

New trial.

CONNOR, J., dissents.

R. D. DUNN ET AL. v. FRED DOUGLAS DUNN ET AL.

(Filed 8 October, 1930.)

1. **Statutes B a—Caption of statute may be referred to in interpretation only when body of statute is ambiguous.**

   Only when the body of a statute is ambiguous and its meaning doubtful may its caption be referred to in its interpretation, and the caption may not contradict the clear meaning of the words used in the statute, especially when the caption has been made by commentators and not by the Legislature itself.

2. **Bastards C a—Petition for legitimating bastards may be addressed directly to the judge.**

   The requirements of C. S., 277 (Revisal, 263), as to the procedure and jurisdiction of legitimating children by their father, is that "the putative father of any illegitimate child may apply by petition in writing to the Superior Court of the county in which he resides . . . and if it appears that the petitioner is reputed the father of the child, the court may thereupon declare and pronounce the child legitimated; and the clerk shall record the decree," and *Held*, the action of the judge of the court having jurisdiction in passing upon the matter is within the intent and meaning of the statute, and his decree is not void upon the ground that the petition should have been originally addressed to the clerk of the court.

APPEAL by plaintiffs from *Midyette, J.*, at January Term, 1930, of LENOIR.

Civil action in ejectment brought by collateral relations of Charles F. Dunn, deceased, against his alleged illegitimate children.

The plaintiffs allege that they are the heirs at law and next of kin to Charles F. Dunn, late of the county of Lenoir, State of North Carolina, and entitled to all the property, real and personal, of which he died seized and possessed; that the defendants, illegitimate children of the said Charles F. Dunn, have, since his death intestate, February, 1929, entered into possession of the lands left by him and taken possession of his personal property, under the mistaken belief that they were duly legitimatized by order of Lenoir Superior Court, entered at the August Term, 1914, and that such action on the part of the defendants is wrongful and unlawful. It is further alleged that the attempted legitimation proceeding, set out in full in the complaint, is null and void, for that, the petition, admittedly sufficient in substance, was addressed to the judge at term, rather than to the clerk; wherefore plaintiffs demand possession of the premises, damages, etc.

The substance of the petition is as follows:

"To Hon. Frank A. Daniels, judge presiding:

"Charles F. Dunn, your petitioner, comes into court and respectfully showeth that he is the putative father of the following named illegitimate children, to wit, Fred Douglas, Abe Lincoln, James Blaine and Ben Butler, . . . recognized by your petitioner, and bear his surname, therefore, he respectfully prays that the court declare them to be the legitimate children of the petitioner."

The order entered thereon by the judge at term purports to legitimate said children, according to the prayer of the petition.

From a judgment sustaining a demurrer, interposed by the defendants, on the ground that the complaint does not state facts sufficient to constitute a cause of action, the plaintiffs appeal, assigning error.

Rountree & Rountree, Powers & Elliott and Geo. B. Greene for plaintiffs.

Charles F. Rouse, of Rouse & Rouse, for defendants.

STACY, C. J. Was, and is, the judgment purporting to legitimate the defendants, entered by the judge at term, valid, or is it null and void, because, under the law in force at the time, the original jurisdiction of petitions for legitimation was conferred on the clerk and not on the judge?

The pertinent statute operative in 1914 was Rev., 263, now C. S., 277, which reads as follows:

"The putative father of any illegitimate child may apply by petition in writing to the Superior Court of the county in which he resides, praying that such child may be declared legitimate; and if it appears that the petitioner is reputed the father of the child, the court may thereupon declare and pronounce the child legitimated; and the clerk shall record the decree."

The body of this statute assumed its present form as early as 1855 (Revised Code of N. C., ch. 12, sec. 8), and has remained unchanged up to the present time. In the Code of 1883 (sec. 39), its caption was "Illegitimate children may be legitimated by Superior Court at term," while in the Revisal of 1905, the caption was changed to "Procedure for legimating bastards," and in the Consolidated Statutes the caption reads, "Legitimation of bastards."

Where the meaning of a statute is doubtful, its title may be called in aid of construction *(Freight Discrimination Cases,* 95 N. C., 434); but the caption will not be permitted to control when the meaning of the text is clear. *In re Chisholm's Will,* 176 N. C., 211, 96 S. E., 1031. Especially is this true where the headings of sections have been prepared by compilers and not by the Legislature itself. *Cram v. Cram,* 116

N. C., 288, 21 S. E., 197. Moreover, it does not appear that the instant caption imports a meaning contrary to the body of the text. See chapter 73 of the Consolidated Statutes on the subject of "Statutory Construction."

A similar question to the one here presented arose in the case of *Fowler v. Fowler,* 131 N. C., 169, 42 S. E., 563, while the statute bore the caption appearing in the The Code of 1883, but was not decided, as the subsequent marriage of the parents in that case itself wrought a legitimation, and thereby rendered it unnecessary for the court to determine the procedural question.

It is the contention of the plaintiffs that as the *Fowler case* was started before the clerk, the Legislature thereafter changed the caption so as to give approval to this procedure, but we think it can make no difference, under the body of the act, whether the petition reach the judge through the clerk, or is presented to him direct. In either event, his judgment would seem to be valid. The language of the statute is, that the putative father may apply by petition in writing "to the Superior Court . . . the court may thereupon declare . . . and the clerk shall record the decree." McIntosh's N. C. Practice and Procedure, 62.

Affirmed.

ART BRONZE AND IRON WORKS v. J. E. BEAMAN ET AL.

(Filed 8 October, 1930.)

Judgments F d—Motion for judgment non obstante veredicto will not be granted when the pleadings support the verdict.

Where the pleadings are sufficient to support the verdict, a motion for judgment *non obstante veredicto* will not be allowed, and where the trial depends upon whether an agreement respecting the defendant's liability had been made between the parties, and the verdict thereon is rendered in favor of the plaintiff, the defendant's motion for judgment *non obstante veredicto* on the ground of failure of consideration will not be allowed when the extent of his plea by way of answer is only the denial of the fact of agreement as alleged in the complaint.

APPEAL by defendant, Perrin W. Gower, from *Daniels, J.,* at May Term, 1930, of WAKE.

Civil action to recover for materials furnished by plaintiff and used by J. E. Beaman, contractor, in the construction of a building for Perrin W. Gower, owner, and to hold the contractor's bond liable therefor.

The right of the plaintiff to recover is not now questioned, but it is alleged by the Commercial Casualty Insurance Company, surety on the contractor's bond, that after the completion of the building, the owner agreed to release the surety from further liability under its bond and to save it harmless from claims of laborers and materialmen, if the said surety would approve a final settlement between the owner and the contractor, whereby the 15 per cent retained percentage of the contract price, in the hands of the owner, could be released to the contractor, and the owner given possession of the building. This was denied by the defendant Gower.

The jury returned the following verdict:

"1. Is defendant Beaman indebted to plaintiff as alleged in the complaint, and if so, in what amount? Answer: Yes, $1,711.71, with interest from 19 October, 1928.

"2. Was the letter of release signed by Southgate & Company, given and accepted upon agreement of Gower to pay all claims? Answer: Yes."

Motion by the defendant Gower for judgment *non obstante veredicto* on the ground that there was no consideration for the alleged agreement; overruled; exception.

Judgment on the verdict for plaintiff, and judgment over against Perrin W. Gower for Commercial Casualty Insurance Company. The defendant Gower appeals.

No counsel appearing for plaintiff.
Clyde A. Douglass and Manning & Manning for defendant Gower.
S. Brown Shepherd for defendant Insurance Company.

STACY, C. J. Appellant's motion for judgment *non obstante veredicto*, which, in effect, is but a belated motion for judgment on the pleadings, was properly overruled on authority of the decisions in *Jernigan v. Neighbors,* 195 N. C., 231, 141 S. E., 586, and *Shives v. Cotton Mills,* 151 N. C., 290, 66 S. E., 141. The defendant Gower, in his answer, denies the agreement as alleged by the Commercial Casualty Insurance Company, but this is the extent of his plea.

The record discloses no exceptive assignment of error upon which a reversal of the judgment might properly be based. Hence, it will not be disturbed.

No error.

MOSKIN BROTHERS. INC., v. BENJAMIN H. SWARTZBERG ET AL.

(Filed 8 October, 1930.)

1. **Appeal and Error J a—In injunctive proceedings Supreme Court may review evidence and find facts.**

On appeal to the Supreme Court in injunctive proceedings the Court may examine the entire evidence and find the facts upon which it will act, and where in a suit to restrain the violation of a condition in a contract of employment, providing that the employee not engage in a similar business within a restricted area for a definite time after the termination of the employment, the trial court fails to find specifically as to whether the employee voluntarily left the employment, it will be presumed that the court found that the employee did voluntarily leave the employment as the evidence tended to show, or that such a finding was immaterial, and a judgment of the Superior Court reversing a correct judgment of a municipal court upon sustaining findings and conclusions of law will be reversed.

2. **Contracts A f—Finding as to whether defendant voluntarily left plaintiff's employment held immaterial.**

Where, in a suit to enjoin the violation of a condition in a contract of employment providing that the employee should not engage in the same business in competition with the employer in a restricted area for a definite time after the termination of the employment for any reason whatsoever, and the contract provides for the termination of the employment by either party for any reason, the question of whether the employee voluntarily left the employment is immaterial.

3. **Same—A contract in restraint of trade is not void if it is reasonable and does not affect the rights of the public.**

A contract not to engage in a certain business within a reasonable area for a reasonable length of time, which does not affect the interests of the public, will not be declared void as being in unreasonable restraint of trade.

4. **Same—Contract in this case held not to be void as in unreasonable restraint of trade.**

A condition in a contract of employment that the employee should not engage in the same business in competition with the employer after the termination of the employment, to be effective for a period of two years within twelve miles of any one of the employer's stores, is not one in unreasonable restraint of trade against public policy, and in a suit by the employer to restrain the violation of the condition, a judgment permanently restraining the defendant from violating the condition for the period of time stipulated therein upon proper findings and conclusion of law will be affirmed.

5. **Injunctions B c—Breach of valid contract not to engage in certain business may be enjoined upon proper facts.**

Where it is made to appear that the plaintiff will be damaged in an unascertainable amount by the breach by his former employee of a valid contract not to engage in the same business in competition with the plaintiff within a restricted area for a reasonable time after the termination of the employment, sufficient grounds are shown for the granting of injunctive relief.

APPEAL by plaintiff from *Moore, J.*, at October Term, 1929, of GUILFORD. Reversed.

This is an action to restrain and enjoin the violation by defendant, Benjamin F. Swartzberg, of a restrictive covenant contained in a contract in writing entered into by and between the plaintiff and the said defendant.

The action was begun in the Municipal Court of the city of High Point, N. C., on 17 July, 1929.

Plaintiff is a corporation organized under the laws of the State of New York, and maintains and operates a store in the city of High Point, N. C., in which it sells, at retail, and on credit, ready-to-wear clothing. It sells clothing on the "installment plan," as described in its complaint in this action.

On 30 January, 1928, plaintiff entered into a contract, in writing, with the defendant, Benjamin H. Swartzberg, a citizen of this State and a resident of the city of High Point. By said contract plaintiff employed said defendant as the manager of its store and business in the city of High Point. The said contract contains a paragraph which is in words as follows:

"Eleventh. The parties hereto recognize that the employer's business is based largely on credit information recorded on various customers' lists, statistical data, and other records of the employer, acquired, collected and classified as a result of substantial outlay in money and effort, and systematized by employer in establishing its business in various cities in the United States, and that irreparable damage would result to employer if such lists, records, or information are obtained or used by any other person, firm or corporation, or any competitor of employer, and said employment is obtained and based upon the trust and confidence reposed by employer in the employee with respect to the proper use of such lists, records and information solely for the employer's benefit and said employment affords employee opportunity of access to such confidential records and information concerning employer's business.

"The employee covenants that in the event of the termination of said employment for any reason whatsoever, he will not for a period of two years from the date of such termination (or if any shorter period be provided by law, then for that period) engage in or accept employment from or become affiliated with or connected with, directly or indirectly, or become interested, directly or indirectly, in any way in any business within the city of High Point, N. C., similar or of a like nature to the business carried on by employer, or in any other city or place wherein employer maintains a store or in which store employee shall have been during his said employment for an aggregate period of one month or more, or within 15 miles of the city of High Point, N. C., or within such distance from any of the places where employer's stores are located in which the employee shall have been as aforesaid.

"The parties hereto recognizing that irreparable injury will result to employer, its business and property in the event of a breach of the covenant herein made by the employee, and that said employment is based primarily upon the covenants and assurances herein made and evidenced, it is agreed that in such event employer shall be entitled, in addition to any other remedies and damages available, to an injunction to restrain the violation thereof by employee, his partners, agents, servants, employers, and employees, and all persons acting for or with him.

"The employee represents and admits that in the event of the termination of his employment for any cause whatsoever, his experiences and capability are such that he can obtain employment in business engaged in other lines and/or of a different nature, and that the enforcement of a remedy by way of injunction will not prevent him from earning a livelihood."

The defendant, Benjamin H. Swartzberg, remained in the employment of the plaintiff, as the manager of its store and business at High Point, N. C., performing his duties as prescribed in the contract of employment, from the date of said contract, to wit, 30 January, 1928, until 14 March, 1929, when said employment terminated. Since leaving the employment of plaintiff, the said defendant has entered into the employment of or has become associated in business with his codefendants. His codefendants are engaged in business in the city of High Point, similar to and of a like nature with the business of the plaintiff. They are competitors of the plaintiff, and operate a store in High Point similar in all essential respects to the store of the plaintiff, and located next door thereto.

The action was heard on 23 July, 1929, on plaintiff's motion that a temporary restraining order theretofore issued therein, be made permanent. From the judgment of said court, restraining and enjoining said defendant from entering into or continuing in the employment of any person, firm or corporation, engaged in a business similar to or of a like nature with the business of the plaintiff, in the city of High Point, or from becoming associated in business with such person, firm or corporation, until after 14 March, 1931, defendant appealed to the Superior Court of Guilford County.

Upon the hearing of said appeal in the Superior Court, the judge presiding therein was of opinion that "the contract signed by the parties is unequal, and is not a contract for the employment of services involving peculiar skill and training, nor for services involving the exercise of high powers of mind peculiar to the defendant, and that the restraint imposed by the contract is not necessary for the protection of the covenantee, and is oppressive, and that the contract is an unreasonable restraint of trade and contrary to public policy."

In accordance with this opinion, defendant's assignments of error on said appeal were sustained, and the judgment of the municipal court of the city of High Point was reversed. It was ordered and adjudged that the temporary restraining order be and the same was dissolved.

From this judgment plaintiff appealed to the Supreme Court.

Robinson, Haworth & Reese and Hays, St. John, Abramson & Schulman for plaintiff.

Gold, York & McAnally for defendant.

CONNOR, J. On his appeal from the judgment of the municipal court of the city of High Point to the Superior Court of Guilford County, the defendant, assigned as error the failure of the judge of said municipal court to find and set out in his judgment the facts upon which he based his conclusions of law, in accordance with which his judgment was rendered. This assignment of error was apparently sustained by the judge of the Superior Court, although his judgment reversing the judgment of the municipal court is not founded on his ruling on this assignment of error. There are no findings of fact specifically set out in the judgment of the municipal court, but it is found, as stated therein, that after consideration of the pleadings filed and the affidavits and testimony introduced, the allegations of the complaint are sustained.

There is no controversy between the parties to this action with respect to the essential facts upon which their rights, in law or in equity, are to be determined. The only fact in issue on the pleadings is as to whether the defendant left the employment of the plaintiff, voluntarily, as alleged by the plaintiff, or as to whether he was discharged from said employment by the plaintiff, without just cause, as alleged by the defendant. Under the provisions of the contract this is immaterial. The contract expressly provides that the employment, which was from week to week, may be terminated by either party for any reason whatsoever, and further that the covenant therein, on which plaintiff relies for the relief prayed for in this action, shall be effective in the event of the termination of the employment for any reason whatsoever. While it may be that, notwithstanding these provisions, the defendant has a cause of action against the plaintiff, if, as defendant alleges, he was discharged without just and lawful cause, for the purposes of this action, it is immaterial whether defendant left the employment of plaintiff voluntarily or not. The circumstances under which defendant left said employment do not appear from his verified answer, or from any affidavit filed by him. It does appear from an affidavit filed by plaintiff that defendant voluntarily surrendered the keys to plaintiff's store, and thereafter demanded and received payment for his services up to and including the date on which the employment terminated. If a finding of fact upon this phase of the case was material, we would find from all the evidence appearing in the record, that defendant voluntarily left the employment of the plaintiff. In *Tobacco Association v. Battle,* 187 N. C., 260, 121 S. E., 629, it is said that on a hearing of this character, this Court will determine for itself the facts upon which it will act, and for that purpose will examine the entire evidence set out in the record on appeal. In the instant case, it will be assumed that the judge of the municipal court of the city of High Point either found that defendant voluntarily left the employment of plaintiff, as there was evidence tending to show, or was of opinion that it was immaterial, for the purposes of this action, whether he left voluntarily or not. *Davenport v. Board of Education,* 183 N. C., 570, 112 S. E., 246. In either event, it cannot be held that the judgment of the municipal court was erroneous because the judge of said court did not find and specifically set out in his judgment the facts with respect to the circumstances under which defendant left the employment of plaintiff.

The defendant further assigned as error the conclusions of law in accordance with which the judgment of the municipal court of the city of High Point was rendered. The judge of said court was of opinion that the restrictive covenant contained in the contract of employment entered into by and between the plaintiff and the defendant, is valid, for that upon the facts alleged in the complaint and admitted in the answer, the said covenant was not unreasonable in its terms, or with respect to the time during which, or the territory within which, the defendant was thereby prohibited from entering into the employment of or becoming associated in business with a competitor of plaintiff. The judge of the Superior Court, on defendant's appeal from the judgment of the municipal court, sustained this assignment of error, and in accordance with his ruling with respect thereto, reversed the judgment of the municipal court and dissolved the temporary restraining order. In this, plaintiff on its appeal to this Court, contends that there was error, for which the judgment of the Superior Court should be reversed.

It has been uniformly held by this Court, that a restrictive covenant, contained in a contract for the sale of a business, including the goodwill of the vendor, and of property, real or personal, used in carrying on said business, by which the vendor agrees not to enter into competition, directly or indirectly, with the vendee, in the conduct of said business is valid, and enforceable by injunction or otherwise, when the covenant is fair and just in its terms, and the time during which, and the territory within which, the covenant shall be in force, are not unreasonable, in view of the facts and circumstances affecting said business, either in duration or extent. Such covenants, being necessary for the protection of the vendee, and only in partial restraint of trade, are not void, for that they are oppressive or contrary to public policy.

The principles on which decisions to this effect are sustained are discussed and applied in opinions filed in the following cases:

Hill v. Davenport, 195 N. C., 271, 141 S. E., 752; *Mar-Hof Co. v. Rosenbacker,* 176 N. C., 330, 97 S. E., 169; *Bradshaw v. Millikin,* 173 N. C., 432, 92 S. E., 161; *Sea Food Co. v. Way,* 169 N. C., 679, 86 S. E., 603; *Faust v. Rohr,* 166 N. C., 187, 81 S. E., 1096; *Wooten v. Harris,* 153 N. C., 43; 68 S. E., 898; *Anders v. Gardner,* 151 N. C., 604, 66 S. E., 665; *Disosway v. Edwards,* 134 N. C., 254, 46 S. E., 501; *Shute v. Heath,* 131 N. C., 282, 42 S. E., 704; *Jolly v. Brady,* 127 N. C., 142, 37 S. E., 153; *Hauser v. Harding,* 126 N. C., 295, 35 S. E., 586; *King v. Fountain,* 126 N. C., 196, 35 S. E., 427; *Kramer v. Old,* 199 N. C., 1, 25 S. E., 813; *Cowan v. Fairbrother,* 118 N. C., 406, 24 S. E., 212.

In *Bradshaw v. Millikin, supra, Walker, J.,* approves the test suggested by *Chief Justice Tindall* in *Honer v. Graves,* 7 Bing., 743, by which to determine the validity of the covenant. If its purpose and effect is to provide only for the reasonable protection of the vendee, who has purchased the business, and property of the vendor, in reliance upon the covenant, and is not to oppress the vendor, who has thereby surrendered his right otherwise to engage in business in competition with his vendee, the covenant, as between the vendor and the vendee, is valid. If the time during which, and the territory within which, the vendor is thereby prohibited from engaging in business, in competition with his vendee, is not so long, or so extensive as to interfere with the interests of the public, the covenant is not void, as being contrary to public policy.

In *Sea Food Co. v. Way, supra, Allen, J.,* says: "In the early cases, contracts in restraint of trade were very generally held to be void, as against public policy, upon the ground that they tended to lessen the opportunities of the party restrained to earn a livelihood and to deprive the community of the benefit of competition. 6 R. C. L., 785. The distinction was, however, soon recognized between contracts in general restraint of trade, which were held invalid, and those in partial restraint of trade, which were sustained, if not unreasonable."

In *Scott v. Gillis,* 197 N. C., 223, 148 S. E., 315, the question was presented to this Court, apparently for the first time, whether the principles which were applied in the foregoing cases were applicable to a covenant contained in a contract between an employer and an employee. In that case the employee had covenanted with his employer that he would not for a period of three years after the termination of the employment, solicit business from customers and clients of his employer for whom he had performed services during the term of his employment. There was evidence at the hearing in the court below, tending to show that defendant, the employee, had violated his covenant. A temporary restraining order was continued to the final hearing of the case, and defendant appealed to this Court. We affirmed the judgment continuing the temporary restraining order to the final hearing. *Clarkson, J.,* writing for the Court, says: "The cases usually cited are when the parties, for a consideration, purchased a business and its good-will, in which they covenanted not to engage in the business—the time limit and the territory being reasonable. In the present case, it was an employee who agreed with his employer, if he left the employer, for three years thereafter not to solicit or accept business from his former employer's clients. By his employment he knew and became associated intimately with his employer's clientele, who ordinarily employed his employer. We see no reason why in good conscience a Court of Equity would not enjoin him from a breach of its contract."

In that case, the employee was a certified public accountant. In the instant case, the employee was the manager of the employer's store and business. It is obvious that in the performance of his duties as such manager, the employee acquired an intimate knowledge of his employer's business, and had a personal association with his customers, which, when his employment terminated for any cause, would enable the employee, if employed by a competitor of his employer, to injure the business of the latter. We think the covenant is reasonable in its terms, and not unreasonable in time or territory. Upon the authority of *Scott v. Gillis, supra,* which is in accord with many cases decided in other jurisdictions (see *Deuerling v. City Banking Company,* 155 Md., 280, 141 Atl., 542, 67 A. L. R., 993, and annotation), the judgment of the Superior Court in this case must be reversed. The action is remanded to the Superior Court of Guilford County that judgment may be entered affirming the judgment of the municipal court of the city of High Point.

Reversed.

STATE ON RELATION OF E. L. SUTTON AND ADELA MAY SUTTON, HIS WIFE, v. JOHN WILLIAMS, R. B. LANE, SHERIFF OF CRAVEN COUNTY, AND THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

(Filed 8 October, 1930.)

1. **Sheriffs C a—Sheriff is liable for escape of prisoner through negligence or malfeasance of himself or his jailer.**

   Where a prisoner convicted of an offense is delivered by law into the hands of the sheriff, it is the sheriff's duty to receive him and commit him to the common jail and keep him in close and safe custody, and both the sheriff and his jailer appointed by him and who acts for him as his agent, C. S., 3944, may be held liable for an escape of such prisoner through failure of the sheriff or jailer to discharge their duties in this respect, C. S., 4393.

2. **Same—Sheriff has no authority to allow prisoner freedom as trusty.**

   Where a sheriff into whose hands a prisoner has been delivered by law permits the prisoner to go at large without guards or surveillance, he suffers the prisoner to escape, and he may not justify his action on the ground that the prisoner was a "trusty" the prisoner not being released from prison to do public work, and there being nothing to show the necessity of the relaxation of the statutory duties of the sheriff.

3. **Escape A a—Definition of escape.**

   An escape is the unlawful departure of a prisoner lawfully confined from the limits of his custody, or his wrongful liberation by a relaxation of his imprisonment through the neglect or malfeasance of the officer lawfully having him in charge, and an escape is effected when the prisoner thus gains his liberty before he is delivered in due course of law.

4. **Principal and Surety B c—Sheriff's bond is not liable for injury caused by prisoner while he is unlawfully at large as trusty.**

   The statutory bonds required to be given by a sheriff, C. S., 3930, may be put in evidence as though they had been written as prescribed by statute, C. S., 324, and where suit is brought on one of the bonds which provides for liability if the sheriff fail to properly execute and return all process, or properly pay all moneys received by him by virtue of any process, "and in all things well and truly and faithfully execute the said office of sheriff," the general provisions of the bond as to the sheriff's faithful performance of the duties of the office relate to the specific obligations therein set out as to service and return of process, and neither the sheriff nor the sureties on his bond is liable thereon in a civil action for damages for a negligent injury inflicted by a prisoner lawfully intrusted to the custody of the sheriff while such prisoner was unlawfully permitted by the sheriff to be at large as a trusty.

APPEAL by plaintiffs from *Cowper, Special Judge,* at May Term, 1930, of CRAVEN. Affirmed.

The complaint contains these allegations: R. B. Lane is the sheriff of Craven County. On 3 December, 1926, he executed and delivered to the commissioners of Craven County an official bond in the sum of $5,000, with the Fidelity and Deposit Company of Maryland, a corporation, as his surety, conditioned that he should "well and faithfully perform all and singular the duties incumbent upon him by reason of his election and appointment as sheriff, except as therein limited, and honestly account for all moneys coming into his hands as sheriff." As sheriff, Lane was charged with and had under his control, management, and direction the jail as provided by law. John Williams was a prisoner, sentenced by the United States District Court for the Eastern District of North Carolina to imprisonment for four months in the county jail, and duly committed to the custody of the sheriff. Williams had previously been convicted and sentenced to terms in jail and on the roads; twice for violation of the Prohibition Law. After he was put in custody under the judgment of the District Court he procured his automobile to be brought into the jail yard; and at various times he was allowed by the sheriff to drive the car about the town and elsewhere during the term of his imprisonment. The sheriff had full knowledge of the use of the car by Williams and of his keeping it in the jail yard, and unlawfully, carelessly, and negligently consented thereto, knowing the criminal disposition and character of the prisoner; he unlawfully and negligently made Williams the jailer's "trusty" and servant, and negligently permitted him while acting as such trusty and servant to go on errands in his car for the jailer, the sheriff, and his deputies. Williams drank excessively of intoxicating liquor. On 15 November, 1928, Williams, while under sentence and in custody of the sheriff, and while acting as a trusty and servant as above set out, and while in an intoxicated condition, drove a Dodge touring car, with the authority and consent of the sheriff, at a high rate of speed upon the highways of the county, and negligently ran into a car driven by the male plaintiff, with whom were his wife and daughter, and seriously injured the plaintiffs.

R. B. Lane and the Fidelity and Deposit Company demurred for the reason that it appears upon the face of the complaint that the action is brought upon the official bond of the sheriff and that the facts alleged do not constitute a breach of any provision of the bond or of any provision which the law imposes under the bond or independently of the bond; and further that the cause of action alleged is too remote to charge the principal or the surety, and that it does not appear that any act of the principal was the proximate cause of the injury complained of, but it does appear that the facts alleged were not the proximate cause.

The demurrer was sustained and leave was granted to amend the complaint. The plaintiffs appealed from the judgment sustaining the demurrer.

Moore & Dunn for plaintiffs.
Ward & Ward for defendants.

ADAMS, J. The action was instituted by E. L. Sutton and his wife against John Williams, R. B. Lane, sheriff, and the Fidelity and Deposit Company of Maryland; but by leave of court the summons and the complaint were amended and the action was prosecuted on the relation of the State. It was thenceforth treated as a suit against the sheriff and the surety on his official bond. When the demurrers of these two defendants were sustained the plaintiffs made no motion for judgment against Williams, the remaining defendant; so the only matter in controversy is the judgment of the court. The plaintiffs insist that the demurrers should have been overruled. .

The defendant Williams was convicted of a crime in the District Court of the United States for the Eastern District of North Carolina, sentenced to imprisonment, and committed to the custody of Sheriff Lane. It was the duty of the officer to receive him and to commit him to the common jail of Craven County. C. S., 1349. The sheriff has the care and custody of the jail in his county and appoints the keeper. C. S., 3944.

At common law if a jailer permitted the escape of a prisoner lawfully committed to his custody the sheriff had to answer for the default. 1 Bl., 346; 1 Hale Pleas of the Crown, 596; 2 Hawk. Pleas of the Crown, ch. 19, sec. 28 *et seq.* It was so because the jailer was regarded as the sheriff's agent or deputy; and now, as a general rule, subject of course to exceptions, a sheriff is liable for the act or omission of his deputy as he is for his own. *S. v. Roane,* 24 N. C., 144; *Tarkinton v. Hassell,* 27 N. C., 359; *Hanie v. Penland,* 194 N. C., 234. Both the sheriff and the jailer may be liable for an escape. If any person charged with a crime or sentenced by the court upon conviction of any offense is legally committed to a sheriff or jailer and is wilfully or negligently suffered by such officer to escape, the officer so offending, being duly convicted thereof, shall be removed from office and shall be fined or imprisoned, and may be both fined and imprisoned, in the discretion of the court. C. S., 4393.

Considered in its double aspect "escape" is an offense which may be committed by the prisoner or by the officer who has him in custody. Accordingly, the word has been defined as "the unlawful departure of a prisoner from the limits of his custody"; "an unlawful withdrawal from arrest or imprisonment"; "the wrongful liberation of a prisoner or relaxation of his imprisonment through the neglect or malfeasance of the officer in charge." It is effected "when one who is arrested gains his liberty before he is delivered in due course of law." *S. v. Johnson,* 94 N. C., 924; *S. v. Ritchie,* 107 N. C., 857; *Brady v. Hughes,* 181 N. C., 234; New International Dictionary; New Standard Dictionary.

The law presupposes that every person committed to jail by due process, unless the judgment or a statute provides otherwise, is to be kept in *arcta et salva custodia,* in close and safe custody; but according to the allegations of the complaint, which by demurring the defendants admit, the sheriff and the jailer permitted Williams to go at large. In doing so they suffered an escape. *Winbourne v. Mitchell,* 111 N. C., 13. They cannot justify on the ground that Williams was a "trusty." There is nothing in the record showing the necessity of a relaxation of the law in behalf of these officers; Williams was not released from prison to do public work, as the prisoner was in *S. v. Johnson, supra.* But even in that event, as the court there held, it would have been their duty to keep Williams in view and under direct control.

The question for decision, however, is whether the sheriff's official bond is liable in damages to the plaintiffs for injury caused by the negligence of Williams while he was permitted to be at large.

The Revisal of 1908, sec. 298, contained a special provision for bonds to be executed by the sheriff of Craven County, but the provision was left out of C. S., 3930. The principal difference is in the penalty of the bonds. C. S., 3930, requires of sheriffs the execution of three bonds: One for the collection and settlement of State taxes; one for the settlement and collection of county and other local taxes; and one for the due execution and return of process, payment of fees and moneys collected, and the faithful execution of the office. This process bond contains the following provision: "The condition of the above obligation is such that, whereas the above-bounden .... is elected and appointed sheriff of .... County; if, therefore, he shall well and truly execute and due return make of all process and precepts to him directed, and pay and satisfy all fees and sums of money by him received or levied by virtue of any process into the proper office into which the same, by the tenor thereof, ought to be paid, or to the person to whom the same shall be due, his executors, administrators, attorneys, or agents; and in all other things well and truly and faithfully execute the said office of sheriff during his continuance therein, then the above obligation to be void; otherwise to remain in full force and effect."

The bond in suit is within the class last named. It does not provide for the collection of taxes, public or private. Its condition is that the "principal shall well and faithfully perform all and singular the duties incumbent upon him by reason of his election or appointment as said sheriff." The statute (C. S., 3930), prescribes substantially this provision for bonds given for the due execution and return of process, etc. It will be observed that the bond sued on contains the latter part, but not the first part of this condition, namely, that the officer should "well and truly execute and due return make of all process and precepts to him directed," etc. But, notwithstanding a variance in the condition of the bond from the provision prescribed by law, the bond may be put in suit as if the condition had conformed to the provisions of the statute. C. S., 324. It is contended that these provisions are constructively included in the bond and that they limit its scope and bear directly upon the question whether the injury complained of resulted from a breach of the sheriff's official obligation. If an official bond is given for a specific object general words are to be construed with reference to that object. In *Eaton v. Kelly,* 72 N. C., 110, suit was brought on a bond the conditions of which were substantially the same as those prescribed for the process bond in C. S., 3930, and the Court, holding that the sheriff was not officially responsible, said: "It cannot be contended that the breach complained of comes within the first clause of this condition, which is for the due return of process, and the payment of all moneys collected, to the proper parties. If the breach complained of is covered by the bond at all, it can be only by the broad, comprehensive and general clause, for 'truly and faithfully, in all things, performing the duties of sheriff.' There are many decisions on the effect of these words. It may now be considered as settled, that they relate only to the true and faithful performance of the sheriff's duty, in the matters above separately mentioned; that is, in the return of process and the payment of money received by virtue of it, etc. To give to these words the extended signification contended for on the part of the plaintiff, would render unnecessary any other words than these, as comprehending every violation of official duty in the condition of the bond declared on; and would also render it superfluous for the sheriff to give bond for the collection and proper payment of taxes, State or municipal. Every duty of the sheriff might be comprehended in these general words if they were not restricted by those which go before and designate the subject-matter to which these are to apply."

The principle thus stated is upheld in *Crumpler v. Governor,* 12 N. C., 52; *Governor v. Matlock, ibid.,* 214; *S. v. Long,* 30 N. C., 415; *S. v. Brown,* 33 N. C., 141; *Prince v. McNeill,* 77 N. C., 398. If the principle is available to the defendants under C. S., 324, the general clause in the bond will be limited by the preceding conditions to the execution and return of process and precepts and the payment of money received or levied by virtue of process. In that event the present action of course could not be maintained.

But, without regard to this, there is another view which is fatal to the contention of the plaintiffs. Accepting the condition of the bond as it is written, we are of opinion that it does not impose on the surety an obligation that the sheriff should do no wrong and should in all respects observe the law. The phrase "performing the duties incumbent upon him by reason of his election or appointment as sheriff" obviously means the duties incumbent upon him in the execution of his office. As said by *Chief Justice Ruffin,* in *S. v. Long, supra,* the sheriff and his surety "are liable upon a contract expressed in definite terms, and their liability cannot be carried beyond the fair meaning of those terms." The general clause "only binds the officer affirmatively to the faithful execution of the duties of his office and does not cover the case of an abuse or usurpation of power. There are no negative words that the sheriff will commit no wrong by color of his office, nor do anything not authorized by law." This construction was afterwards approved in *S. v. Brown, supra.* From the fact that an officer may be indicted for neglect or refusal to perform a public duty it does not follow that he is liable therefor in a civil action. In *South v. Maryland,* 18 Howard, 396, 15 Law Ed., 433, an action on the official bond of a sheriff for default in the discharge of a public duty, the Court applied the following principle and denied the plaintiff's alleged right to recover damages: "When the sheriff is punishable by indictment for a misdemeanor, in cases of a breach of some public duty, his sureties are not bound to suffer in his place, or to indemnify individuals for the consequences of such a criminal neglect. It is an undisputed principle of the common law, that for a breach of a public duty, an officer is punishable by indictment; but where he acts ministerially, and is bound to render certain services to individuals, for a compensation in fees or salary, he is liable for acts of misfeasance or nonfeasance to the party who is injured by them." By virtue of our statute, as above stated, a sheriff or jailer allowing a prisoner who is legally committed to escape is subject to indictment, C. S., 4393; and in case of an escape or rescue from arrest in a civil action the official bond of the sheriff may be liable. C. S., 789, 790; McIntosh's N. C. Pr. & Procedure, 915.

In this case the official bond of the sheriff is not responsible for the injury suffered by the plaintiffs and the demurrers were properly sustained.

Whether the sheriff is personally liable for injury proximately resulting from the negligence of Williams is a question we are not called upon to decide. The complaint is not specific on the point whether Williams at the time of the injury was on an errand for the jailer or the sheriff; and the allegation that he drove the car with the authority and consent of the sheriff, if construed most strongly against the sheriff, would raise a question only as to his personal liability. An officer may be liable personally although not liable on his bond. *Holt v. McLean,* 75 N. C., 347. Judgment

Affirmed.

ANNIE L. NEWBOLD AND W. A. NEWBOLD v. MEADOWS FERTILIZER COMPANY.

(Filed 8 October, 1930.)

Damages C a—Plaintiff may not recover where damage is remote, uncertain and speculative.

The plaintiff may not recover damages for breach by the defendant of a contract to ship fertilizer when the plaintiff's losses to crops are contingent, speculative, or merely possible, and are not such as in the ordinary course of things are reasonably proximate and certain.

APPEAL by plaintiffs from *Grady, J.*, at April Term, 1930, of ONSLOW. Affirmed.

N. E. Day and Dawson & Jones for plaintiffs.
John D. Warlick and L. I. Moore for defendant.

PER CURIAM. The plaintiffs claim to have given the defendant an order for fertilizer which was never filled, and for the defendant's alleged breach of a contract to ship fertilizer they seek to recover damages. At the close of the evidence the trial judge intimated an opinion that only nominal damages, if any, could be recovered. The plaintiffs submitted to a nonsuit and appealed. This ruling is sustained by authorities to the effect that damages are not allowed for losses which are contingent, speculative, or merely possible and are not such as in the ordinary course of things are reasonably proximate and certain. The evidence fails to establish a standard by which the alleged loss may be determined with sufficient certainty.

We have considered all the assignments of error and find no satisfactory reason for sustaining them. Judgment

Affirmed.

MRS. MINNIE T. DUNCAN, ADMINISTRATRIX OF THE ESTATE OF A. R. DUNCAN, DECEASED, v. E. R. GULLEY, C. W. PENDER, J. M. TURLEY, L. T. ROSE, TRUSTEE FOR W. I. W. WHITLEY, BANKRUPT, MRS. MAYME DEBNAM AND MRS. T. A. GRIFFIN, ADMINISTRATORS OF THE ESTATE OF DR. J. A. GRIFFIN, DECEASED, THE NORTH CAROLINA JOINT STOCK LAND BANK, AND THE FIRST NATIONAL TRUST COMPANY, TRUSTEE.

(Filed 15 October, 1930.)

1. **Mortgages C c—Prior registered mortgage is first lien on mortgaged lands as against mortgages and equities not appearing of record.**

No notice, however full and formal, will supply the place of registration required by our statute, C. S., 3311, and a registered mortgage on lands constitutes a first lien on the mortgaged lands as against prior mortgages or equities which the registration books in the county in which the land lies does not disclose.

2. **Same—In this case held: registered mortgage constituted first lien as against equitable claim of administratrix of deceased purchaser.**

Where the owners in common and cultivators of agricultural lands as partners sell their interests in the lands to one of the partners upon his assumption in his deed of all encumbrances placed upon the land by the grantors and his agreement therein to pay off all partnership debts and save the grantors harmless, and subsequently the purchasing partner borrows money under a deed of trust on the property and pays off the prior registered encumbrances, but fails to pay all the outstanding partnership debts, and thereafter judgment is obtained by one of the partnership creditors, and the purchasing partner dies: *Held,* the deed of trust given by the deceased partner constitutes a first lien upon the land prior to the subsequently docketed judgment and the claim of the administratrix of the deceased partner of a prior lien for the amount for which the estate was liable for the unpaid partnership debts, there being no agreement in the deed to the deceased partner that the partnership debts should constitute a lien upon the land, and the equities arising among the members of the partnership are not presented for adjustment upon the present record.

APPEAL by the North Carolina Joint Stock Land Bank, from *Sinclair, J.,* and a jury, at June Special Term, 1930, of JOHNSTON. New trial.

Civil action by plaintiff to have partnership obligations declared an equitable and first lien on certain land superior to lien of defendant, North Carolina Joint Stock Land Bank.

J. A. Griffin, E. R. Gulley, C. W. Pender, J. M. Turley, W. I. Whitley and A. R. Duncan, each had one-sixth interest in the "John Ellington Farm," being a tract of 597 acres in Johnston County, N. C. They were partners, and in running the farm had contracted certain debts; also in the purchase of the land they had assumed certain liens on it. On 4 May, 1926, J. A. Griffin, A. R. Duncan and wife, Minnie T. Duncan, and W. I. Whitley and wife, Nina D. Whitley, conveyed their three-sixths (one-half) interest in the land to E. R. Gulley in fee simple. The deed was duly probated and filed for registration and registered 20 May, 1926, in Johnston County, N. C.

The deed recited a consideration of $100, and had the following: "And the said parties of the first part do for themselves and their heirs, executors and administrators, covenant to and with the said E. R. Gulley, his executors, administrators, and heirs and assigns, that the said Dr. J. A. Griffin, W. I. Whitley and A. R. Duncan each owns a one-sixth undivided interest in and he is seized of said premises in fee, and has a right to convey same in fee simple; that the same are free and clear of all encumbrances, except such as have been placed upon the property by the parties hereto, C. W. Pender and J. M. Turley, the original owners of this tract, and these encumbrances and all other debts, liabilities and obligations due and owing by the partnership originally composed of the parties hereto, C. W. Pender and J. M. Turley, the party of the second part assumes and contracts and agrees to pay and to fully indemnify and save harmless the said Dr. J. A. Griffin, W. I. Whitley and A. R. Duncan from any loss or liability which they, or either of them may sustain by reason of having originally contracted any of said partnership debts; and the parties of the first part do forever warrant and will forever defend the title to the same against the lawful claims of all persons whomsoever."

The North Carolina Joint Stock Land Bank, among other defenses, set up the following: "That, at the time this defendant made the loan of $29,000 to the defendant, E. R. Gulley, it had no knowledge of any indebtedness assumed by the said E. R. Gulley, except such as appeared of record, that is to say, a deed of trust to the Chickamauga Trust Company securing the payment of the sum of $30,000, and the unpaid taxes, all of which was paid off and discharged out of the money furnished to the defendant, E. R. Gulley, by this defendant, and all of which was done directly for the benefit of and in the interest of the plaintiff's intestate and the defendant grantors of the said E. R. Gulley, and this defendant expressly denies that the debts referred to in paragraph 8 of the complaint are in any manner any lien or charge against the property conveyed by the deed of trust of 19 June, 1926, to the First National Trust Company of Durham, trustee, for this defendant."

E. R. Gulley, among other defenses, set up the following: "That, the grantors who conveyed this land to this defendant well knew that a new loan would have to be negotiated in order to prevent the threatened foreclosure of the deed of trust by the Chickamauga Trust Company, and this defendant procured a loan directly to himself from the North Carolina Joint Stock Land Bank on said land, and he took the money derived from this new loan and paid off the deed of trust to the Chickamauga Trust Company, and the taxes, which constituted the only liens of record existing against this property, and the plaintiff's intestate and other grantors, knew that that was the purpose of securing this new loan, and that the money was thus applied in discharging said liens, and they are now estopped to deny that the deed of trust to the First National Trust Company, trustee for the North Carolina Joint Stock Land Bank, is not the first and prior lien upon this property, and their conduct is especially set up as a defense and pleaded by this defendant as an estoppel."

E. R. Gulley admitted owing the debts and had made arrangements to pay part of them, and was anxious to pay them as soon as he had the funds, but denied the partnership obligations were a lien on the land.

The issues submitted to the jury and their answers thereto were as follows:

"1. Did the said A. R. Duncan, C. W. Pender, J. M. Turley, W. I. Whitley, E. R. Gulley and Dr. J. A. Griffin form a partnership to purchase and operate the farm described in the complaint, as alleged in the complaint? Answer: Yes.

2. Did the defendant, E. R. Gulley, assume the payment of the partnership obligations as a consideration for the execution of the deed by A. R. Duncan and others, as alleged? Answer: Yes.

3. What is the amount now due on said indebtedness? Answer: $4,000, with interest from 6 November, 1928.

4. Is the farm described in the complaint a part of the partnership property? Answer: Yes."

The court below charged the jury as follows: "Gentlemen of the jury, if you find the facts to be as testified by all the evidence, I direct you to answer the first, second and fourth issues, Yes, and the third issue $4,000, with interest from 6 November, 1928."

The court below rendered the following judgment, in part: "And the court being of the opinion, upon the verdict, that the said indebtedness is a prior lien upon the farm property described in the complaint: It is now, therefore, upon motion of J. D. Parker, attorney for the plaintiff, and Abell & Shepherd, attorneys for the estate of J. A. Griffin, ordered, adjudged and decreed that the indebtedness of $4,000, and interest, be and the same is hereby declared a specific first lien upon the real property set out and described in Exhibit 'B' attached to the complaint, and that the said real property be sold and the proceeds thereof applied to the satisfaction of said indebtedness, the costs of this action, and such expenses and allowances as may be made by the court."

The defendant, North Carolina Joint Stock Land Bank, made numerous exceptions and assignments of error and appealed to the Supreme Court. The other necessary facts will be set forth in the opinion.

James D. Parker for plaintiff.
Abell & Shepherd for the estate of J. A. Griffin.
Levinson & Poole for North Carolina Joint Stock Land Bank.

CLARKSON, J. The North Carolina Joint Stock Land Bank, at the close of plaintiff's evidence, and at the close of all the evidence, made motions in the court below for judgment as in case of nonsuit. C. S.,

567. The court below overruled these motions, and in this we think there was error.

The creditor, the Bank of Wendell, obtained a judgment of $4,000 and interest from 6 November, 1928, against all the partners, including plaintiff's intestate. The plaintiff's contention is that as administratrix of her husband, A. R. Duncan's estate, she is entitled to a first lien on the "John Ellington Farm," of 597 acres, as his estate is liable as one of the partners on the $4,000 judgment of the Bank of Wendell. From the entire record we cannot so hold. There is no language in the deed from plaintiff's intestate and others of 4 May, 1926, for one-half interest in the land conveyed to E. R. Gulley, that gives a lien on the land for the partnership debts. Plaintiff's intestate and the others conveyed the one-half interest in the land to E. R. Gulley, who assumed and agreed to pay off the encumbrances put on the property by C. W. Pender and J. M. Turley, which plaintiff's intestate and all the parties had assumed, amounting to $30,000 and taxes. To carry out this agreement, he borrowed $29,000 from the defendant, North Carolina Joint Stock Land Bank, and made a deed of trust to the First National Trust Company, trustee, on the land to secure same. The money loaned Gulley by the North Carolina Joint Stock Land Bank and more was paid on the $30,000 encumbrance on the land and taxes. The North Carolina Joint Stock Land Bank loaned the $29,000, and there is no allegations in the pleadings that there was any fraud or mutual mistake in the conveyance from plaintiff's intestate and others to E. R. Gulley of which the North Carolina Joint Stock Land Bank had notice.

In *Phillips v. Buchanan Lumber Co.,* 151 N. C., at 521, this Court, speaking to the subject, said: "Besides, a purchaser for value from one whose deed was procured by fraud gets a good title if he has no notice of the fraud. *Odom v. Riddick,* 104 N. C., 515, and cases there cited. Even a purchaser with notice of the fraud from an innocent purchaser without notice gets good title. *Glenn v. Bank,* 70 N. C., 205; *Fowler v. Poor,* 93 N. C., 466." *Brown v. Sheets,* 197 N. C., at p. 273, 63 A. L. R., 1357.

We think the recital in the deed means what it says: That Gulley assumed and agreed to pay the encumbrances already on the land and all other partnership debts—"assumes and contracts and agrees to pay and to fully indemnify and save harmless," etc. There is no language that can be construed or any strained construction can be put on the language in the deed that the partnership debts were a lien on the land which was conveyed by plaintiff's intestate and others to E. R. Gulley. Of course the encumbrance was already on the land which Gulley assumed and has paid through a new loan of $29,000. Whatever rights and equities plaintiff has in reference to being a partner of Gulley, need not be discussed on this record. We think plaintiff is estopped to claim a first lien on the property. Plaintiff's intestate and others made a deed to Gulley in fee simple; it was duly recorded. The North Carolina Joint Stock Land Bank when it loaned the $29,000 on examination of the record found the $30,000 lien and taxes on the land. These were paid off and canceled with the $29,000 loan and additional funds of Gulley. Relying on the record, the North Carolina Joint Stock Land Bank loaned the $29,000. In the deed made to Gulley there was no agreement that the partnership debts should be a lien on the land; there was only a personal obligation to pay them by Gulley. He has paid all except the $4,000. In the controversy, and on the entire record he appears to have acted in absolute good faith in the entire transaction.

Under our registration act, C. S., 3311, the North Carolina Joint Stock Land Bank acquired a first lien on the land.

In *Door Co. v. Joyner,* 182 N. C., at p. 521, it is said: "In the construction of our registration laws, this Court has very insistently held that no notice, however full and formal, will supply the place of registration."

In *Best v. Utley,* 189 N. C., at p. 364-5, it is said: "The public policy, upon which our registration laws are founded, favors an interpretation and construction of statutes relative to probates and registration, which will encourage confidence in records affecting titles, rather than suspicion, doubt and uncertainty."

For the reasons given there must be a

New trial.

JAMES P. BUNN, EXECUTOR, ET AL. v. ALLEN J. MAXWELL, COMMISSIONER, ET AL.

(Filed 15 October, 1930.)

1. **Taxation E c—Statutory procedure for recovery of tax alleged to have been illegally collected must be complied with.**

In order for a taxpayer to avoid the payment of a tax claimed by him to have been illegally assessed by the State, he must comply with the procedure provided in the statute, section 464, chapter 80, Public Laws of 1927, and where the statute specifies that he must pay the tax to the proper officer and notify him in writing that he pays under protest, and at any time within thirty days demand its refund from the State Commissioner in writing, and if not refunded in ninety days, bring action to recover the amount, the remedy given must be followed in order for the taxpayer to recover the amount, and the failure of the taxpayer to make the demand required until nearly two years after the payment of the tax is fatal, 3 C. S., 7979(a), requiring the State Auditor to issue his warrant in certain instances, has no application.

2. Mandamus A b—Nature and grounds for writ in general.

Mandamus is to enforce the performance of a duty already owing by the defendant to the party seeking the writ, and the party to be coerced must be under legal duty to perform the act sought.

APPEAL by plaintiffs from *Cowper, Special Judge,* at August Special Term, 1930, of WAKE.

Application for writ of mandamus to require the defendants, as provided by 3 C. S., 7979(a), to refund taxes alleged to have been illegally collected, heard "upon the pleadings and upon agreement of parties that the court might find all necessary facts not appearing in the pleadings."

It appears from the pleadings and the findings of the court:

1. That plaintiffs are the duly appointed representatives of the estate of John M. Sherrod, late of Henrico County, State of Virginia, who died 20 May, 1927, owning stock in certain North Carolina corporations and solvent credits or notes secured by deeds of trust on lands located in this State.

2. That the certificates of stock in said corporations were, at the time of decedent's death, in his possession and custody in the State of Virginia and had been for a number of years prior thereto; while the solvent credits in question were in the State of North Carolina in the physical custody of the personal attorney of the deceased, and had thus acquired a business situs here.

3. That an inheritance tax, or transfer tax, of $2,959.18 was levied against decedent's corporate stocks in North Carolina corporations and a like tax of $7,208.42 was levied against his aforesaid solvent credits by the Commissioner of Revenue of North Carolina.

4. That said taxes were paid under protest 21 June, 1928, and no demand for their refund was made until 25 February, 1930.

5. That plaintiffs have failed to comply with section 464, chapter 80, Public Laws of 1927 (the Revenue Act), and section 464, chapter 345, Public Laws of 1929 (the Revenue Act) relating to the payment of taxes under protest and bringing of actions for the recovery of the taxes paid and involved in this action.

6. That on or about 8 May, 1930, plaintiffs made demand upon the defendants, under 3 C. S., 7979(a), for a return of the taxes in question, but the defendants, and each of them, declined to accede to plaintiffs' request.

From judgment denying application for mandamus and dismissing action, the plaintiffs appeal, assigning error.

Battle & Winslow for plaintiffs.

Attorney-General Brummitt and Assistant Attorney-General Nash for defendants.

STACY, C. J. The taxes in question were levied under the Revenue Act of 1927 (chap. 80, Public Laws 1927), which, in terms, provides the following method for recovering taxes illegally collected or unlawfully assessed thereunder:

"Section 464. No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this act. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property such person shall pay such tax to the proper officer, and notify such officer in writing that he pays same under protest. Such payment shall be without prejudice to any defense or rights he may have in the premises and he may, at any time within thirty days after such payment, demand the same in writing from the Commissioner of Revenue of the State if a State tax or if a county, city or town tax, from the treasurer thereof, for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, may sue such official for the amount so demanded; and if upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of State taxes for which judgment shall be rendered in such action shall be refunded by the State."

It is conceded that the provisions of the above section have not been observed. The defendants, therefore, at the outstart, challenge the appropriateness of the remedy selected by the plaintiffs. We think this challenge must be sustained. *Mfg. Co. v. Commissioners of Pender,* 196 N. C., 744, 147 S. E., 284; *Rotan v. State,* 195 N. C., 291, 141 S. E., 733.

True, it is provided by 3 C. S., 7979(a) that whenever taxes of any kind have been collected through clerical error, or misinterpretation of law, or otherwise, and paid into the State Treasury in excess of the amount legally due the State, the Auditor shall issue his warrant for the amount, so illegally collected, to the person entitled thereto, upon certificate of the head of the department through which said taxes were collected, with the approval of the Attorney-General, and the Treasurer shall pay the same out of any funds in the treasury not otherwise appropriated; provided demand is made for the correction of such error or errors within two years from the time of such payment. But without determining the exact meaning of this statute, or undertaking to pass upon its validity, if still existent, we think it is sufficient to say that it has no application to the facts of the instant case. *Blackwell v. Gas-*

tonia, 181 N. C., 378, 107 S. E., 218; *Teeter v. Wallace,* 138 N. C., 264, 50 S. E., 701; *R. R. v. Reidsville,* 109 N. C., 494, 13 S. E., 865.

Furthermore, it may be doubted as to whether mandamus will lie to compel obedience to its provisions, even if valid and applicable. *Umstead v. Board of Elections,* 192 N. C., 139, 134 S. E., 409. Mandamus lies only to compel a party to do that which it is his duty to do without it. It confers no new authority. The party seeking the writ must have a clear legal right to demand it, and the party to be coerced must be under a legal obligation to perform the act sought to be enforced. *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481.

The legality of the instant taxes, at the time of their assessment, was fully supported by the decision of the Supreme Court of the United States in the case of *Blackstone v. Miller,* 188 U. S., 189. This much is conceded. But it is contended that with the overruling of this decision, 6 January, 1930, in the case of *Farmers Loan and Trust Co. v. Minnesota,* 74 L. Ed., 190, followed by *Baldwin v. Missouri,* 74 L. Ed., 593, the collection of the present taxes can no longer be sustained. Without conceding the soundness of this position, which is vigorously assailed by the defendants, we are content to confine our decision to the procedural question presented. Plaintiffs omitted to avail themselves of the remedy provided by the statute under which the taxes, sought to be recovered, were levied and collected. This is fatal to their case. *Hatwood v. Fayetteville,* 121 N. C., 207, 28 S. E., 299.

The application for writ of mandamus was properly denied.

Affirmed.

SALLIE W. PRIDGEN v. HOLEMAN PRODUCE COMPANY.

(Filed 15 October, 1930.)

1. **Highways B f—Evidence held sufficient to take case to jury on question of proximate cause and intervening negligence.**

   Evidence tending to show that the plaintiff was being driven by her husband in his automobile and that the driver of the defendant's truck, in attempting to pass the car in which she was riding, suddenly and without warning drove his truck back to the right of the road in front of the car driven by the plaintiff's husband before the truck had completely passed the car, and that her husband, to avoid a collision with the truck drove his car off the road and hit a filling station, causing the injury in suit, is *held,* sufficient to take the case to the jury upon the question of whether the negligence of defendant's driver was the proximate cause of the injury or whether the husband of the plaintiff was guilty of intervening negligence relieving the defendant of liability.

2. **Evidence K a—Husband may testify from his own observation as to the fact and extent of his wife's suffering from negligent injury.**

   In the wife's action to recover damages for an alleged negligent personal injury it is competent for her husband to testify from his own observation both as to the fact and the extent of her suffering.

3. **Negligence B c—Acts of third person placed in imminent peril by defendant's negligence held not to be intervening negligence barring recovery.**

   Where a driver negligently turns back to the right before having fully passed a car on the highway, subjecting the driver of the car in which the plaintiff is riding to imminent peril, the plaintiff's driver will not be held to the same deliberation or circumspection as he would in ordinary circumstances, and in this case his driving off the road and hitting a filling station is held not to constitute intervening negligence as a matter of law, which would insulate the negligence of the defendant, and relieve him from liability.

APPEAL by defendant from *Devin, J.*, at May Term, 1930, of WARREN. No error.

Action to recover damages for personal injuries caused by the negligence of the defendant.

Plaintiff was riding in an automobile driven by her husband on the highway from Raleigh to Wake Forest. Defendant's truck, loaded with produce and driven by one of its employees, overtook the automobile and attempted to pass on its left. Before the truck had passed the automobile, its driver, without warning, suddenly turned to his right, across the highway and in front of the moving automobile. The driver of the automobile, in order to avoid a collision, turned to his right, drove off the highway and crashed into a filling station. As the result, plaintiff sustained painful injuries to her person, for which she demands damages of the defendant.

Plaintiff contended that her injuries were caused by the negligence of the driver of defendant's truck; defendant denied that its driver was negligent as alleged in the complaint, and contended that plaintiff's injuries were caused by the negligence of the driver of the automobile; that if its driver was negligent, as alleged in the complaint, the proximate cause of plaintiff's injuries were not such negligence, but the negligence of the driver of the automobile.

The jury, in response to the issues submitted by the court, found that plaintiff was injured by the negligence of the defendant and assessed her damages at $1,500.

From judgment that plaintiff recover of the defendant the sum of $1,500, and the costs of the action, defendant appealed to the Supreme Court.

Julius Banzet for plaintiff
Smith & Joyner for defendant.

CONNOR, J. We find no error in the trial of this action. It was competent for plaintiff's husband to testify, from his observation, both as to fact and as to the extent of her suffering. The jury was properly and correctly instructed as to the principles of law discussed and applied in *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761, relative to the negligence of a third party which insulates the negligence of the defendant, and is, therefore, the proximate cause of plaintiff's injuries. There was ample evidence to sustain the finding of the jury that the proximate cause of plaintiff's injuries was the negligence of the driver of the truck, for which defendant was liable on the principle of *respondeat superior.*

There was evidence tending to show that the driver of the automobile, in which plaintiff was riding, was confronted by a sudden peril caused by the negligence of the driver of defendant's truck. It is doubtful whether there was evidence tending to show that he acted otherwise than as a prudent man under the circumstances, which constituted an emergency. In *Hinton v. R. R.,* 172 N. C., 587, 90 S. E., 756, it is said: "It is well understood that a person in the presence of an emergency is not usually held to the same deliberation or circumspect care as in ordinary conditions." If the conduct of the driver of the automobile was not such negligence as would bar his recovery, it is manifest that such conduct was not negligence insulating the negligence of the defendant, and therefore relieving defendant of liability to the plaintiff in this action, because its negligence was not the proximate cause of her injuries. The judgment is affirmed. We find

No error.

VANCE SASSER AND WIFE, LULA SASSER, v. R. W. BULLARD.

(Filed 15 October, 1930.)

Husband and Wife F a—In this action brought by husband and wife it is held: demurrer for misjoinder of parties and causes was properly sustained.

Where a civil action for damages is brought by a husband and wife for an alleged assault against them both, for alleged false arrest of the male plaintiff and abuse of process in swearing out a peace warrant against him and his false imprisonment, the defendant's demurrer on the ground of misjoinder of parties and causes of action is properly sustained and the case dismissed, the several causes of action not affecting all the parties to the action as required by C. S., 507, and C. S., 2513, authorizing a married woman to bring suit for damages for personal injuries without the joinder of her husband.

APPEAL by plaintiffs from *Grady, J.,* at February Term, 1930, of CUMBERLAND.

Civil action to recover damages: First, for an alleged assault upon both plaintiffs; second, for an alleged false arrest of the male plaintiff; third, for an alleged malicious abuse of process in swearing out a peace warrant against the male plaintiff; and, fourth, for an alleged false imprisonment of the male plaintiff.

From a judgment sustaining a demurrer, interposed on the ground of a misjoinder both of parties and causes of action, and dismissing the action, the plaintiffs appeal.

A. M. Moore for plaintiffs.
Robinson, Downing & Downing for defendant.

STACY, C. J. That there is a misjoinder, both of parties and causes of action, is apparent on the face of the complaint, since C. S., 2513, authorizes a suit by a married woman to recover damages for personal injuries without the joinder of her husband *(Kirkpatrick v. Crutchfield,* 178 N. C., 348, 100 S. E., 602), and the several causes of action, united in the present complaint, do not "affect all the parties to the action," as required by C. S., 507.

Where this dual misjoinder occurs, as in the instant case, and a demurrer is accordingly interposed, the decisions are to the effect that the demurrer should be sustained and the action dismissed. *Shuford v. Yarborough,* 198 N. C., 5, 150 S. E., 618; *Bank v. Angelo,* 193 N. C., 576, 137 S. E., 705; *Roberts v. Mfg. Co.,* 181 N. C., 204, 106 S. E., 664; *Thigpen v. Cotton Mills,* 151 N. C., 97, 65 S. E., 750.

The case of *Shore v. Holt,* 185 N. C., 312, 117 S. E., 165, is not at variance with our present holding.

Affirmed.

W. C. HINSDALE v. W. I. PHILLIPS COMPANY ET AL.

(Filed 15 October, 1930.)

1. Cancellation of Instruments B a—Superior Court has jurisdiction to decree cancellation of instruments in proper instances.

The Superior Court has jurisdiction over a suit to cancel a deed or mortgage and to administer equities therein involved.

2. **Cancellation of Instruments A a—Where promissory representation is made in good faith remedy is for damages at law and not for cancellation.**

The failure of the seller of land in a development to perform his promissory representations as to improvements to be made therein is not sufficient ground for equity to afford the remedy of cancellation and rescission where the representations are made in good faith with the present intent to perform, the remedy of the purchaser being, in proper instances, an action at law for damages for condition broken.

3. **Cancellation of Instruments A b—Promissory representation must be made without intent to perform to be ground for cancellation.**

In order for equity to afford the relief of cancellation and rescission for the failure of a seller of land in a development to perform his promissory representations as to improvements to be made therein, the representations must be made without the present intent of the promisor to perform, and must deceive and be relied on by the promisee and materially induce him to enter into the contract to his damage.

4. **Same—Where all the evidence tends to show that promissory representations were made in good faith nonsuit should be entered in suit for cancellation.**

Where, in a suit to rescind a deed and cancel notes given for the purchase price for the failure of the seller of land in a development to perform his promissory representations as to improvements to be made therein, there is evidence that the seller put a large number of men to work upon the improvements and spent large sums of money thereon, and all the evidence tends to show that the representations were honestly made with the present intent to perform, the defendant's motion as of nonsuit should be allowed.

5. **Cancellation of Instruments B c—Defendant in this case held barred by his laches from bringing suit for cancellation and rescission.**

Where the owner of a development sells certain lots therein and represents that certain improvements would be made in the development within a year, and a purchaser of some of the lots takes possession of the lots conveyed, occupying as a home a house on one of the lots, for a period of over two years, and enters into a trust agreement for the completion of the improvements by a trustee, and large amounts of money are expended by the original seller and the trustee in making improvements therein, and the purchaser brings suit for cancellation and rescission three years after the execution of the deed: *Held*, his equitable right, if any, to rescission of the deed and cancellation of the notes given for the purchase price, for that the representations in regard to the proposed improvements were false and fraudulent, is barred by his acceptance of benefits accruing to him from the contracts, and his delay in demanding a rescission of the deed, and the defendant's motion as of nonsuit should have been allowed.

APPEAL by defendants from *Finley, J.*, at December Term, 1929, of BUNCOMBE. Reversed.

This is a civil action (1) for the rescission of certain contracts by which plaintiff purchased from the defendant, W. I. Phillips Company, certain lots of land, described in deeds dated 11 July, 24 July, 14 August, and 28 September, 1925; (2) for the cancellation of certain notes executed by the plaintiff, and payable to the order of the said W. I. Phillips Company, the consideration for said notes being the balance due on the purchase price for said lots of land; (3) for the recovery of the sum of $17,467.47, paid in cash by the plaintiff to the said W. I. Phillips Company, on the purchase price for said lots of land, contemporaneously with the execution of said deeds; and (4) for other relief.

Prior to and on the dates of said deeds the defendant, W. I. Phillips Company, a corporation, owned a tract or parcel of land located in Limestone Township, Buncombe County, North Carolina, which the said company had caused to be surveyed and divided and subdivided into lots, to be sold for residential and other purposes. On the dates of the several deeds set out in the complaint, to wit, 11 July, 24 July, 14 August, and 28 September, 1925, the said W. I. Phillips Company contracted and agreed to sell to the plaintiff, and the plaintiff contracted and agreed to buy from the said W. I. Phillips Company, the lots of land described therein. As inducements to plaintiff to buy and pay for said lots, the said W. I. Phillips Company represented to and promised the plaintiff that it would cause certain improvements, as set out in the complaint, to be made, within one year from the dates of said deeds, on said tract or parcel of land, which included the said lots purchased by the plaintiff. The said W. I. Phillips Company represented to the plaintiff, and to other prospective purchasers of lots, that it had in bank the money with which to pay for said improvements. It was further represented to plaintiff by the said W. I. Phillips Company that said improvements, which would consist of paved streets and boulevards, water and sewer systems, and a casino, to be erected at a cost of not less than $40,000, would greatly enhance the value of the lots purchased by the plaintiff, and of other lots included in said subdivision, which was known as Royal Pines. Plaintiff relied on the representations and promises of the W. I. Phillips Company, in his purchase of said lots.

After the execution of the deeds set out in the complaint, and after the plaintiff had paid the purchase price for the lots conveyed thereby, in cash and by the execution of the notes described in the complaint, plaintiff entered into possession of said lots of land, claiming title thereto under said deeds. A large and commodious house was located on one of said lots; plaintiff, with his family, moved into said house, and occupied it as a home until 1 September, 1927.

At the dates of said deeds the defendant, W. I. Phillips Company, was engaged in making improvements on its property known as Royal Pines, of the kind and character which it represented to plaintiff it would make and complete within one year. It continued the work required for said improvements until some time during the late spring or early summer of 1926. During this time the said company kept a force of 50 to 100 men at work on said property, making said improvements. During the summer of 1926 this force was gradually diminished in number, until finally, during the latter part of the summer, all work on said improvements ceased. The improvements which the defendant, W. I. Phillips Company had represented and promised the plaintiff and other purchasers of lots would be made, have not been completed, and the work done, in many essential respects, is defective. Plaintiff, however, retained possession of the lots purchased by him from the defendant, W. I. Phillips Company, and continued to occupy the house on one of said lots as his home. There was no evidence tending to show that plaintiff made any complaint to the said company, at any time from the dates of his deeds, until the work on the improvements ceased, with respect either to the quality of the work done, or to the delay in completing said improvements.

On or about 1 September, 1926, the defendant, L. B. Jackson, became by purchase the owner of all the capital stock of the W. I. Phillips Company. An announcement of this fact, and that L. B. Jackson had assumed entire control and management of the Royal Pines was made in local newspapers. At this time all work on the improvements in Royal Pines had ceased. These improvements had not been completed. Thereupon, plaintiff and other lot owners in Royal Pines met, and after a full discussion of the situation, appointed a property owners committee, which was authorized to employ counsel to advise with them and to protect the interests of all the lot owners in Royal Pines. Plaintiff was a member of this committee. The committee employed as its counsel an attorney at law, who was a member of the bar of Buncombe County. The defendant, L. B. Jackson, was present at one of the meetings of the lot owners in Royal Pines. There was evidence tending to show that the defendant, L. B. Jackson, at first denied that the W. I. Phillips Company was under any legal obligation to make the improvements which the said company had represented to the purchasers of lots in Royal Pines would be made. Subsequently, however, he announced that he had been advised by his counsel that the property owners in Royal Pines had rights with respect to said improvements which were enforceable. He thereupon stated that he would make said improvements, but for that purpose would expend only such sums of money as were absolutely necessary to comply with the legal obligation of the W. I. Phillips Company.

After the defendant, L. B. Jackson, had purchased all the capital stock of the W. I. Phillips Company and had assumed entire control and management of said company, he caused said company to enforce, in blank, all the notes then held by said company for balances due by purchasers of lots in Royal Pines, on the purchase price for said lots. At this time, the aggregate amount of said notes was $961,528.44. The said L. B. Jackson sold and delivered the said notes to the Continental Mortgage Company for the sum of $200,000, which was paid to him in cash by said mortgage company, upon the delivery of the said notes to it. It is conceded that the sale of the said notes by defendant, L. B. Jackson, to the Continental Mortgage Company was illegal, but that said mortgage company at the time it received said notes, and paid the purchase price for same, did not know that the said L. B. Jackson was not authorized to sell and deliver said notes.

In the meantime, an action had been begun in the Superior Court of Buncombe County, entitled Noland *et al. v.* W. I. Phillips Company *et al.,* for the appointment of a receiver of the said company and for other relief. In this situation, the property owners committee, appointed by the purchasers of lots in Royal Pines, with its counsel, met in the latter's office in the city of Asheville, with the defendant, L. B. Jackson, and his counsel. As a result of this meeting, a trust agreement was entered into by and between the W. I. Phillips Company, and L. B. Jackson, as parties of the first part, and the Wachovia Bank and Trust Company, trustee, as party of the second part. This trust agreement, set out in the record, was approved by the property owners committee, and their attorney, as evidenced by the signatures of the members of said committee and said attorney.

Contemporaneously with the execution of said trust agreement, the Continental Mortgage Company assigned, transferred and delivered to the defendant, Wachovia Bank and Trust Company, with the approval of the property owners committee, as evidenced by the signatures of the members of said committee, and of their attorney, all the notes then in the hands of the said Continental Mortgage Company, which the said company had received from the defendant, L. B. Jackson, with full power and authority to collect said notes, and apply the proceeds thereof in accordance with the provisions of said trust agreement. Among the notes thus assigned, transferred and delivered to the Wachovia Bank and Trust Company, trustee, were the notes executed by the plaintiff and payable to the order of the W. I. Phillips Company, for the balance due on the purchase price of the lots conveyed to plaintiff by said company.

In the trust agreement, and also in the assignment of the notes, as aforesaid—both approved by the plaintiff as a member of the property owners committee, as evidenced by his signature on each of said instruments—it is provided that the Wachovia Bank and Trust Company, as trustee, out of the proceeds of said notes, shall pay (1) the sum of $15,000 to the attorneys for the plaintiffs in the action entitled Noland *et al. v.* W. I. Phillips Company *et al.;* (2) the sum of $177,108.22 with accrued interest to the Continental Mortgage Company, the said sum being the balance then due said mortgage company on account of the sum of $200,000 paid by said company to the defendant, L. B. Jackson, upon the delivery of said notes by the said Jackson to the said mortgage company; (3) the cost and expense of making certain improvements in Royal Pines in accordance with a schedule prepared by certain engineers, dated 31 August, 1926; and (4) the balance, if any, to the defendant, L. B. Jackson. It is provided that the trustee shall have as compensation for its services certain commissions as agreed upon, to be paid out of the proceeds of said notes. It is further provided that the trustee shall have power to authorize the defendant, L. B. Jackson, to hypothecate said notes in its possession to secure the payment of any loan or loans procured by him for the purpose of paying the cost and expenses of the improvements to be made in Royal Pines, the proceeds of any loan or loans to be paid to the trustee to be applied by said trustee only to the payment of such cost and expenses.

After the execution of said trust agreement and assignment, both dated 1 September, 1926, work was resumed on the improvements in Royal Pines under the direction of the engineers named in the trust agreement. There was evidence tending to show that the work on said improvements was defective, and that the improvements agreed to be made have not been completed, in accordance with the schedule attached to the said trust agreement. Plaintiff continued in possession of the lots purchased by him from the W. I. Phillips Company, in 1925, from the date of the trust agreement and assignment, to wit: 1 September, 1926, to 1 September, 1927. There was no evidence tending to show that during this time plaintiff complained to the trustee, to the defendant, L. B. Jackson, or to the defendant, W. I. Phillips Company, with respect to the quality of the work being done on said improvements. Plaintiff has made no payment on his notes held by the trustee under the trust agreement and assignment. This action was begun on 9 May, 1928.

Since the delivery of the notes executed by purchasers of lots in Royal Pines to it, under the provisions of the trust agreement, and of the assignment, the Wachovia Bank and Trust Company, as trustee, has collected on said notes the sum of $383,985.95; in addition to said sum, the said trustee has received from L. B. Jackson the sum of $85,632.16, the proceeds of a loan procured by him from the Wachovia Bank and Trust Company, and secured as provided in the trust agreement, making a total sum of $469,618.11, in the hands of the trustee, available for distribution in accordance with the provisions of the trust agreement, and of the assignment. This sum has been distributed by the said trustee as follows: (1) $15,000 to the attorneys for the plaintiffs in the Noland suit; (2) $180,262.05 to the Continental Mortgage Company in full payment of the amount due to said mortgage company; (3) $240,411.64, paid by said trustee for work done on the improvements made in Royal Pines, in accordance with the provisions of the trust agreement; (4) $18,050.15, paid on the loan procured by L. B. Jackson from the Wachovia Bank and Trust Company, reducing the amount due on said loan to $67,682.01; and (5) $2,340.31, paid to the trustee as commissions. There is now in the hands of the Wachovia Bank and Trust Company, as the trustee named in the trust agreement, the sum of $2,952.62.

The plaintiff, W. C. Hinsdale, as a witness in his own behalf, over the objection of the defendants, testified that before he signed the trust agreement and the assignment, evidencing his approval of both said instruments, as a member of the property owners committee, he was assured by the defendant, L. B. Jackson, and others present, that he would not thereby waive any right of action that he then had against the W. I. Phillips Company, on account of his purchase of the lots conveyed to him by the deeds dated in July, August and September, 1925. The defendants, W. I. Phillips Company and L. B. Jackson, excepted to the admission of this testimony as evidence.

At the close of all the evidence the defendants, W. I. Phillips Company and L. B. Jackson, moved for judgment dismissing the action as of nonsuit. This motion, first made at the close of the evidence for plaintiff, was denied, and said defendants excepted. They further excepted to the denial of their motion at the close of all the evidence.

Issues were submitted to the jury and answered as follows:

"1. Was the plaintiff induced to purchase the property from the defendant, W. I. Phillips Company, as a result of the false and fraudulent representations and inducements made by said defendant, as alleged in the complaint? Answer: Yes.

2. If so, did the defendant, L. B. Jackson, after he acquired the stock of the W. I. Phillips Company, participate in said fraud and/or aid and abet therein, as alleged in the complaint? Answer: Yes.

3. Did the plaintiff by his conduct waive his right as against W. I. Phillips Company to have the notes mentioned and described in the complaint, canceled and the purchase money paid by him returned? Answer: No.

4. Did the plaintiff by his conduct waive his right as against L. B. Jackson to have the notes mentioned and described in the complaint, canceled and the purchase money paid by him returned? Answer: No.

5. Is the plaintiff estopped by his conduct from claiming a cancellation and rescission of said notes as against the defendant, Wachovia Bank and Trust Company? Answer: Yes.

6. Is the plaintiff entitled to recover of the defendant, W. I. Phillips Company, the relief demanded in the complaint? Answer: Yes.

7. Is the plaintiff entitled to recover of the defendant, L. B. Jackson, the relief demanded in the complaint? Answer: Yes."

On the foregoing verdict it was ordered, adjudged and decreed:

"(1) That the plaintiff have and recover of the defendants, W. I. Phillips Company, and L. B. Jackson, the sum of $17,467.47, with interest thereon from 28 September, 1925, until paid.

(2) That upon the satisfaction of said judgment for $17,467.47, with interest and costs, the plaintiff herein execute and deliver to the party paying the same, or to the clerk of the court, for the use of said party, a good and sufficient deed conveying the property described in the complaint, and which was purchased by the plaintiff from the W. I. Phillips Company, free and clear from any and all encumbrances, excepting such as may have been placed against same by any State, county, town, township, or other political division, subdivision, or municipal corporation, and said conveyance being subject to the right or rights of the Wachovia Bank and Trust Company under this judgment.

(3) That the defendants, W. I. Phillips Company and/or L. B. Jackson, are entitled to the said land described in the complaint subject to the rights of the Wachovia Bank and Trust Company under this judgment, upon paying the $17,467.47, with interest and costs, above referred to, and not until then; and that the plaintiff herein has a lien upon said land for the payment of said sum, and that if execution issue against the property of the defendants, W. I. Phillips Company and L. B. Jackson, and be returned unsatisfied, in that event the lien of the plaintiff may be foreclosed by the sheriff of Buncombe County selling the said property at public auction at the courthouse steps, after notice of said sale has been advertised in some newspaper published in Buncombe County, North Carolina, once a week for four weeks, and after notice thereof has been posted at the courthouse door and three other public places in Buncombe County, N. C., for thirty days; and that the sheriff apply the proceeds of said sale upon the judgment above referred to.

(4) That the defendant, Wachovia Bank and Trust Company, hold the notes executed by this plaintiff, and which were given by this plaintiff as a part of the purchase money for the property heretofore mentioned until such time as the Wachovia Bank and Trust Company has been repaid the sum of $67,582.01, with accrued interest, and that the

lien of the plaintiff on the property heretofore mentioned, created by this judgment, be subject to such right or rights as the Wachovia Bank and Trust Company may have under this judgment, and that any sale under execution as hereinabove provided, and any conveyance under this judgment be made subject to such right or rights as the Wachovia Bank and Trust Company may have under this judgment.

(5) That the Wachovia Bank and Trust Company exhaust its remedies against the W. I. Phillips Company, L. B. Jackson, and all other parties, for the repayment of the sum advanced by it, and also exhaust its remedies on the purchase-money notes of other parties, which are now held by the said Wachovia Bank and Trust Company, by foreclosing under the deeds of trust securing said notes, or by bringing suit against the makers of said notes, and also exhaust its remedies on all other collateral which the said Wachovia Bank and Trust Company now holds, or may hereafter acquire as security for the same advanced by it, before making any attempt to collect the notes of this plaintiff by foreclosure suit or otherwise, and that upon the said Wachovia Bank and Trust Company receiving the said sum of $67,582.01, with interest from any source whatever, in payment of the sums advanced by it, the said Wachovia Bank and Trust Company shall deliver to this plaintiff or to the clerk of the court for the use of this plaintiff, the said purchase-money notes executed by this plaintiff referred to above, for the purpose of cancellation; and that in the event the Wachovia Bank and Trust Company shall collect from other sources a portion of the sum advanced by it, the said Wachovia Bank and Trust Company shall be entitled to collect on the said notes executed by this plaintiff, only so much thereof as shall be necessary to pay the sums advanced by the Wachovia Bank and Trust Company, with interest thereon.

(6) That the defendants, W. I. Phillips Company and L. B. Jackson, herein, pay the costs of this action to be taxed by the clerk, and that no costs be taxed against the Wachovia Bank and Trust Company."

From the foregoing judgment, the defendants, W. I. Phillips Company, L. B. Jackson, and Wachovia Bank and Trust Company appealed to the Supreme Court.

J. Y. Jordan, Jr., and J. M. Horner, Jr., for plaintiff.
Campbell & Sample for W. I. Phillips Company and L. B. Jackson.
Alfred S. Barnard for Wachovia Bank and Trust Company.

CONNOR, J. This is an action begun and tried in the Superior Court of Buncombe County for the rescission of certain contracts made and entered into by and between the plaintiff, and the defendant, W. I. Phillips Company, a corporation, during the summer of 1925; for the cancellation and surrender of certain notes executed by the plaintiff, and for the recovery of sums of money paid by the plaintiff to said defendant, pursuant to said contracts. The relief sought by the plaintiff of the defendants other than the said W. I. Phillips Company is predicated altogether upon his right to have said contracts rescinded by judgment and decree in this action. If plaintiff is not entitled to this relief as against the defendant, W. I. Phillips Company, it is clear that he has no cause of action against the other defendants upon which he is entitled to the relief sought against them in this action. The first question, therefore, to be decided on this appeal is whether upon the allegations of the complaint, and upon the evidence offered at the trial, plaintiff is entitled to the equitable remedy of rescission.

The jurisdiction of a Court of Equity, or of a court exercising the powers of a Court of Equity, such as the Superior Court of this State, to direct and enforce the rescission of contracts, and the surrender and cancellation of written instruments for due cause, and to grant such other relief as the party may be entitled to, is settled beyond question. 9 C. J., 1159. The grounds on which equity interferes for rescission are distinctly marked, and every case proper for this branch of its jurisdiction is reducible to a particular head. They are principally fraud, mistake, turpitude of consideration, and circumstances entitling to relief on the principle of *quia timet;* and generally they do not include inadequacy of price, improvidence, surprise, or mere hardship. Promises, honestly made, which the promisor cannot fulfill, do not furnish sufficient grounds for vacating a contract based thereon; but mutual mistake, or false representations as to material facts which constitute an inducement to the contract and upon which the party had a right to rely, will give equity jurisdiction. 4 R. C. L., 487.

As a general rule, fraud as a ground for the rescission of contracts, cannot be predicated upon promissory representations, because a promise to perform an act in the future is not in the legal sense a representation. Fraud, however, may be predicated upon the nonperformance of a promise, when it is shown that the promise was merely a device to accomplish the fraud. A promise not honestly made, because the promisor at the time had no intent to perform it, where the promisee rightfully relied upon the promise, and was induced thereby to enter into the contract, is not only a false, but also a fraudulent representation, for which the promisee, upon its nonperformance, is ordinarily entitled to a rescission of the contract. These principles have been recognized and applied by this Court in *Shoffner v. Thompson,* 197 N. C., 667, 150 S. E., 195; *McNair v. Finance Company,* 191 N. C., 710, 135 S. E., 90; *Bank v. Yelverton,* 185 N. C., 314, 117 S. E., 299; *Pritchard v. Dailey,* 168 N. C., 330, 84 S. E., 392; *Hill v. Gettys,* 135 N. C., 373, 47 S. E., 449, and in many other cases cited in the opinions in these cases.

Where there was evidence showing that promissory representations were made by the defendant as inducements to plaintiff to enter into the contract, and that plaintiff rightfully relied upon such representations, as alleged in his complaint, and that the promises were not performed by the defendant, after the contract was entered into by and between the parties, it has been held by this Court that the fraudulent intent, at the time the promises were made, not to perform them, could be inferred by the jury from the fact of nonperformance. *Clark v. Laurel Park Estates,* 196 N. C., 624, 146 S. E., 584. Authorities are cited in the opinion by *Clarkson, J.,* in support of the decision in that case. Quoting from *Braddy v. Elliott,* 146 N. C., 578, 60 S. E., 507, it is said that the subsequent acts and conduct of a party to a contract may be submitted to the jury as some evidence of his original intent and purpose, when they tend to indicate it. Where, however, as in the instant case, all the evidence as to the subsequent acts and conduct of the promisor, shows that after the contracts sought to be rescinded on the ground of fraudulent representations, were entered into, there was a substantial and continued effort on the part of the promisor, involving the expenditure of a large sum of money, to perform the promises, this principle does not apply, for the reason that the evidence does not show or tend to show a fraudulent intent, at the time the promises were made, not to perform them. If, as the evidence in this case tends to show, the improvements which the W. I. Phillips Company promised and represented to the plaintiff would be made in Royal Pines, were not completed, or were defective, as alleged in the complaint, the plaintiff is entitled to recover damages for breach of contract; he is not entitled, however, to the equitable remedy of rescission on the ground of fraud, for the reason that there was no evidence which shows that at the time the contracts were entered into, the W. I. Phillips Company did not intend to perform the promissory representations alleged in the complaint. Indeed, all the evidence tends to show that these representations were honestly made, as an inducement not only to plaintiff to purchase lots, but also to others to do likewise. For nearly a year after plaintiff purchased lots in Royal Pines, the W. I. Phillips Company kept a force of 50 to 100 men at work, making the improvements as represented. Since the execution of the trust agreement, which was approved by the property owners committee, the trustee has expended over $240,000, collected on the notes of the lot owners, and advanced by the defendant, L. B. Jackson, on improvements in Royal Pines. With respect to the representation made contemporaneously with the execution of the deeds, that W. I. Phillips Company then had in bank a sufficient sum of money to pay the costs of the improvements as promised to the plaintiff and other purchasers of lots, it is sufficient to say that there was no evidence tending to show that this representation was false in fact. The evidence shows that said company did expend large sums of money in making improvements in Royal Pines in accordance with its representations and promises.

Conceding, however, that there was evidence tending to show that plaintiff was induced to enter into contracts with the defendant, W. I. Phillips Company, for the purchase of lots in Royal Pines by false and fraudulent representations as alleged in the complaint, we are of opinion that all the evidence showed that plaintiff by his conduct has waived, both as to said company and as to the other defendants, his right to a rescission of said contracts. His equity, if any, was barred by his acceptance of benefits accruing to him from said contracts, and by his delay in demanding the equitable remedy of rescission. Plaintiff entered into possession of the lots conveyed to him by the W. I. Phillips Company during the summer of 1925, and remained in such possession, occupying as a home for himself and family, a house on one of the lots, until 1 September, 1927. If the promissory representations with respect to improvements in Royal Pines were fraudulent, as alleged by plaintiff, for that they were not honestly made by the W. I. Phillips Company, plaintiff could have discovered the fraud, at least, prior to 1 September, 1926, when as a member of the property owners committee he elected to retain said lots and rely upon the provisions of the trust agreement, for the completion of said improvements in accordance with the schedule prepared by the engineers and attached to the trust agreement.

In *Van Gilder v. Bullen,* 159 N. C., 291, 74 S. E., 1059, it is said: "It is also well established that the right to rescind must be exercised promptly, and if there is unreasonable delay, the right is lost, and the party defrauded is generally relegated to his action for damages. *Alexander v. Utley,* 42 N. C., 242; *Knight v. Houghtalling,* 85 N. C., 17." In that case it was held that the party who alleged that he had been induced to enter into the contract by fraudulent representations made by the other party, had no right of rescission, as there had been a delay of about two years after the discovery of the alleged fraud, before the action in which he prayed for rescission was commenced. During this time the said party had retained the deed procured by the contract, and did no act indicating a purpose to rescind. The decision in that case is determinative, we think, of the instant case. The plaintiff in this case has lost his right of rescission, if any he ever had, and is relegated to an action for damages resulting from the breach of contract by the W. I. Phillips Company.

We have not discussed or decided the questions presented by this appeal with respect to the admission of evidence at the trial, nor have we considered plaintiff's motion that the appeal of the defendant, Wachovia Bank and Trust Company, be dismissed for the reasons assigned. In the view which we take of this case, these questions, although discussed in the briefs and in the oral argument, have become immaterial. There was error in the refusal of defendant's motion, at the close of all the evidence, that the action be dismissed, as of nonsuit. Upon all the evidence plaintiff has failed to show that he is entitled to the equitable remedy of rescission. Indeed, it would be unjust and inequitable for the plaintiff to be relieved of his obligation by reason of the execution of his notes, payable to W. I. Phillips Company, and to recover the money paid on the purchase price of the lots conveyed to him. It would seem that the other property owners who relied upon the execution of the trust agreement in which provision was made for the improvements in Royal Pines, in which they as well as the plaintiff are interested, have rights of which they would be unjustly deprived if plaintiff should be granted the relief for which he prays by this action. It may be that these property owners, as well as plaintiff, are entitled to recover damages of the W. I. Phillips Company and L. B. Jackson, for a breach of contract, with respect to the improvements in Royal Pines.

In accordance with this opinion, the judgment must be

Reversed.

BECKER COAL AND BUILDERS SUPPLY COMPANY v. BOARD OF EDUCATION OF PENDER COUNTY AND THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

(Filed 15 October, 1930.)

Principal and Surety B b—In this case held: refusal of requested instruction in regard to payment of materialmen by contractor was harmless.

In an action on a bond for the construction of a public school given as required by C. S., 2445, the surety is entitled to recover the actual loss sustained by him by reason of the failure of the county board of education to retain the required percentage from the amount actually used by the contractor to pay laborers and materialmen, *Crouse v. Stanley, ante,* 186, but where it is found as a fact by the referee and approved by the trial court that the required percentage was retained, and that the contractor had paid out more than the contract price, the refusal of special instructions requested by the surety that payment by the contractor for materials would not be presumed, is harmless.

APPEAL by Fidelity and Deposit Company of Maryland from *Cranmer, J.,* at March Term, 1930, of PENDER.

Civil action to recover for materials furnished by plaintiff and used by contractor in the construction of a public school building.

The main purpose of the suit is to hold the Fidelity and Deposit Company of Maryland liable for the claim of plaintiff, and other intervening materialmen, by reason of a $14,370 bond executed in accordance with the provisions of C. S., 2445, to the Board of Education of Pender County to save it harmless, together with materialmen and laborers, from losses due to any failure of the contractor, Walter Clark, to complete a public school building at Long Creek, N. C., and to pay for all labor done and materials furnished thereon, agreeably to the terms of a written contract between the contractor and the board of education.

Upon denial of liability and issues joined, a reference was ordered and the matters heard by Norman C. Shepard, Esq., who found the facts and reported the same, together with his conclusions of law, to the court.

The referee's findings were in favor of the plaintiff, the interveners, and partly in favor of the defendant, board of education.

A number of exceptions were filed to the report of the referee; and on issue based on facts pointed out in exceptions filed by the Fidelity and Deposit Company of Maryland and raised by the pleadings, there was a jury trial in the Superior Court which resulted adversely to the position taken by appellant.

From a judgment modifying and affirming the report of the referee on exceptions duly filed, the same being undisturbed by the verdict of the jury, the Fidelity and Deposit Company of Maryland appeals, assigning errors.

No counsel appearing for plaintiff.
McCullen & McCullen for defendant Board of Education.
Isaac C. Wright for defendant Fidelity and Deposit Company.
Bryan & Campbell for intervener, Murchison National Bank.
Dickinson & Freeman for intervener, Blue Ridge Lumber Company.

PER CURIAM. Viewing the record in its entirety, we have discovered no exceptive assignment of error which we apprehend should be held to work a reversal of the judgment. The conclusion reached is in line with *Crouse v. Stanley, ante,* 186, and other pertinent decisions.

It is complained that on the trial before the jury the court declined to instruct the jury, as requested by appellant, in response to argument of counsel for plaintiff and interveners, that payment by the contractor for materials delivered would not be presumed in the absence of evidence on the subject. *Non constat,* so far as the present record is concerned, the refusal would seem to be harmless in view of the following finding of fact, made by the referee and approved by the judge:

"22. There is no evidence from which the referee can find that the defendant board of education paid to Walter Clark, contractor, at any time, more than 85 per cent of that which the contractor had paid for labor performed and material delivered, the undisputed evidence being that the contractor actually paid out for labor and material more than the total amount of the contract."

On the whole it would seem that appellant has fared reasonably well in the court below.

No error.

JAMES R. ROGERS v. JESSE H. RAY.

(Filed 15 October, 1930.)

1. **Evidence C c — The burden is on an intervener to prove the issue raised by him.**

   The burden is on an intervener in an action to prove the issue raised by him.

2. **Chattel Mortgages B c—Question of whether lien of conditional sales contract was lost by registration of subsequent chattel mortgage by vendor held for jury.**

   Upon the question in this case as to whether the lien under a prior conditional sales contract had been lost by the taking of a subsequent chattel mortgage, the evidence was of sufficient probative force to take the case to the jury, and the refusal of an instruction directing a verdict was proper.

3. **Appeal and Error E b—Where instruction does not appear of record it is presumed correct.**

   The correctness of an instruction not appearing of record is presumed on appeal.

APPEAL by intervener, The Mack International Motor Truck Corporation, from *Daniels, J.*, at second May Civil Term, 1930, of WAKE. No error.

The issue submitted to the jury and their answer thereto were as follows: "Is the intervener's title to the truck superior to plaintiff's title? Answer: No."

S. W. Eason for plaintiff.
John N. Duncan for intervener.

PER CURIAM. This is a civil action brought by James R. Rogers against Jesse H. Ray, to recover judgment on a note secured by a chattel mortgage and possession of six motor trucks described therein, and claim and delivery proceeding was instituted to recover possession of said motor trucks. The Mack International Motor Truck Corporation intervened in the action and claimed to be the holder of a first lien on one of the six motor trucks, to wit, one 2½-ton Mack, Model 1-AB, Chassis No. 576855, by reason of a conditional sales agreement recorded prior to the chattel mortgage held by the plaintiff. The plaintiff contended that the intervener's first lien had been lost by reason of its having taken and recorded two other conditional sales agreements covering said truck subsequent to the recordation of his chattel mortgage and introduced evidence tending to sustain the contention that the chattel mortgage of plaintiff was a first lien.

"The intervener becomes the actor and the burden of the issue is on the intervener." *McKinney v. Sutphin,* 196 N. C., at p. 321.

The exception and assignment of error made by the intervener: "For that the court erred in overruling the intervener's motion for a directed verdict in its favor and against the plaintiff when the plaintiff rested his case." The court below overruled this motion, and in this we see no error.

The evidence was not strong, but more than a scintilla and sufficient to be submitted to the jury. The charge of the court below is not in the record. The presumption is that the court below stated in a plain and correct manner the evidence given in the case and declared and explained the law arising thereon. C. S., 564. In the judgment we find

No error.

STATE v. C. W. BAKER.

(Filed 22 October, 1930.)

1. **Bills and Notes I f—"Bad Check Law" is to be strictly construed as a criminal statute.**

   Our "bad check law" is a criminal statute and must be strictly construed, and in order for a drawer or maker of a check to be convicted thereunder it is necessary that he have knowledge at the time of drawing the check that he did not have sufficient funds and had not arranged with the drawee bank for its payment upon presentation.

2. **Same—Evidence in this case held insufficient to go to jury as to principal's criminal liability for check drawn by agent.**

   Where, in a prosecution under our bad check law, the evidence tends to show that the defendant was a fish dealer and had arranged with another to buy for him as his agent, and had furnished him a blank check book and authorized him to draw checks on his account signed in his name by the other as agent, and that the agent drew a check in payment of oysters as authorized and that the check was returned marked "insufficient funds," and there is no evidence that at the time the check was drawn the principal had knowledge of the drawing of the check or the amount thereof: *Held*, the evidence is insufficient to show knowledge required for conviction under the statute, and judgment as of nonsuit should have been entered. C. S., 4643.

STACY, C. J., concurring; ADAMS, J., dissenting.

APPEAL by defendant from *Barnhill, J.*, and a jury, at June Term, 1930, of CARTERET. Reversed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Louis W. Gaylord for defendant.

CLARKSON, J. The defendant was indicted under chapter 62, Public Laws 1927, generally known as the "Bad Check Law," as follows: "It shall be unlawful for any person, firm or corporation, to draw, make, utter or issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing and delivering such check or draft as aforesaid, that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation. Any person, firm or corporation violating any provision of this section shall be guilty of a misdemeanor. The word 'credit' as used herein shall be construed to mean an arrangement or understanding with the bank or depository for the payment of any such check or draft."

The defendant introduced no evidence, and at the close of the State's evidence made a motion to dismiss the action. C. S., 4643. This motion of defendant was overruled by the court below and in this we think there was error. The evidence on the part of the State was to the effect that the defendant, who lived at Greenville, N. C., employed one Leland Mason to buy fish and oysters for him, in Carteret County, N. C. He gave him a check book with blank checks in it, on the Greenville Banking and Trust Company, with authority to draw checks on defendant's account in said bank. Mason drew a check on said bank payable to Gaskill Bros., of Morehead City, N. C., for oysters purchased by him from them on 11 February, 1930. The check was for $72.60, and the oysters were delivered on defendant's truck. The check was signed "C. W. Baker, by Leland Mason." The check was deposited by Gaskill Bros., and returned unpaid for insufficient funds. Other checks signed this way by Mason were paid. Baker was not present when the check was given by Mason.

Criminal statutes are construed strictly. The statute requires, as one of the ingredients of the crime, that when the check is delivered to another that the maker or drawer must have knowledge that he has insufficient funds on deposit in or credit with the bank on which the check is drawn, with which to pay same on presentation. *S. v. Crawford,* 198 N. C., 522. The check was not drawn by defendant, but by his agent, Mason, and Baker was not present; so, at the time the check was drawn and delivered to Gaskill Bros. by Mason, there is no evidence that defendant knew either the time or the amount of the check that was drawn. At the time the check was delivered, the record discloses no evidence that Baker had actual or implied knowledge that there was insufficient funds on deposit, or such actual or implied knowledge so that he could make arrangements to have credit with the bank to meet the check. One cannot be convicted of a crime on conjecture. Of course defendant is liable on the record in a civil action, and it goes without saying that he should pay his debt contracted by his agent for the oysters he received, but to convict him for a crime under the statute, either actual or implied knowledge is necessary when the check is delivered. The evidence is mere conjecture on this record and not sufficient to be submitted to a jury. The judgment is

Reversed.

STACY, C. J., concurs in result on the ground that the record discloses no evidence of scienter, such as the statute requires. *S. v. Yarboro,* 194 N. C., 498, 140 S. E., 216.

Of course a principal is liable, criminally as well as civilly, for the acts of his agent to which he is privy, assents to, encourages, or aids and abets, in such a way as to involve him morally in the guilt of the agent's misdoings. 8 R. C. L., 66; *S. v. Parris,* 181 N. C., 585, 107 S. E., 306; *S. v. Kittelle,* 110 N. C., 560, 15 S. E., 103. But the evidence in the instant case is lacking as to the defendant's knowledge of insufficient funds on deposit in or want of credit with the bank or depository with which to pay the check in question upon presentation—a vital and necessary ingredient of the offense. *S. v. Yarboro, supra.*

True, the record contains the following entry: "It was admitted that at the time the check was drawn, the defendant did not have sufficient funds in the bank to pay the same and had not made arrangements with the bank to pay the check upon presentation." But this admission falls short of establishing guilty knowledge on the part of the defendant at the time the check in question was issued and delivered to Gaskill Bros. Nor is it sufficient to warrant the jury in finding this crucial fact, and thus bridge the hiatus in the State's case. *S. v. Johnson, ante,* 429.

The evidence raises a suspicion, somewhat strong perhaps, of the defendant's guilt, but more is required in a criminal prosecution to carry the case to the jury. *S. v. Battle,* 198 N. C., 379, 151 S. E., 927; *S. v. Montague,* 195 N. C., 20, 141 S. E., 285.

ADAMS, J., dissenting: The defendant was convicted of giving a worthless check for $72.60 in violation of law. He authorized Leland Mason as his agent to buy fish and oysters; he gave Mason a check book and requested the bank to honor checks drawn by Mason as his agent; apparently there was no limit to the number or the amount of the checks to be drawn by Mason. The check in question was given by Mason to Gaskill Brothers "under that authority from Baker." The defendant cannot escape liability by showing that Mason was his agent. *S. v. Kittelle,* 110 N. C., 560.

Judge Barnhill's charge to the jury was clear and accurate. He instructed them that they could not convict the defendant unless they found that the check was delivered to Gaskill Brothers by the agent, Mason, for and on behalf of the defendant, and that at the time it was delivered the defendant did not have funds in the bank to meet it and had not made arrangements with the bank for its payment. He told them that the last two propositions were admitted by the defendant and that they "must further find beyond a reasonable doubt that at the time the check was drawn, issued, and delivered the defendant knew he did not have sufficient funds in the bank to pay the check upon presentation."

The judge in a previous part of the charge had said this: "Now, the defendant admits that when this particular check was delivered to the prosecuting witness by the man named Mason he did not have in the bank of Greenville sufficient funds to pay the check, and that he had not made arrangements with the bank for the payment of it upon presentation."

This admission, which is a part of the record, was repeated, then, in the charge to the jury.

So the only question is whether there is any evidence that the defendant knew his funds in the bank were insufficient to pay the check. The jury found that he had such knowledge; they would hardly have come to this conclusion in the absence of any evidence in its support. Direct and unequivocal testimony is not required; circumstances may be convincing. About the time the check was returned the defendant had other outstanding checks for the payment of which no provision had been made. A second worthless paper drawn in the same way was then in the hands of Gaskill Brothers. He failed to comply with his promise to Gaskill "to settle the matter up." These and other circumstances, together with the fact that the defendant had apparently given Mason unlimited authority to draw checks as his agent is, in any view of the case, evidence from which the jury may be justified in their finding that the defendant knew he did not have sufficient funds in the bank. Can he evade liability by clothing his agent with unrestricted power to draw checks in his name and then be heard to say he did not know his funds had been exhausted? If his position is correct, the appointment of an agent may result in a convenient and effective method of abolishing the statute. I think Judge Barnhill made no error in submitting the case to the jury.

BANK OF CLINTON v. GOLDSBORO SAVINGS AND TRUST COMPANY.

(Filed 22 October, 1930.)

1. **Bills and Notes B b—Evidence that note was transferred by endorsement held sufficient.**

   Where the maker of a promissory note arranges with a bank to take up the note, the endorsement from the payee is some evidence of a transfer of the note, which, taken with other evidence in this case, is sufficient to be submitted to the jury on the question of its bargain and sale.

2. **Mortgages H l—In this case holder of mortgage note was entitled only to pro rate with holders of other notes in proceeds from foreclosure.**

   Where a deed of trust on lands secures several notes in a series payable at different dates, and provides for acceleration upon the failure to pay any note or interest when due, and the trust deed is foreclosed upon the failure to pay one of the notes at maturity, a holder of one of the prior notes by endorsement without recourse is not entitled to payment in full from the proceeds of the foreclosure sale, but only to a *pro rata* payment with the holders of the other mortgage notes.

3. **Mortgages C e—Holder of note reciting that it was secured by mortgage is charged with notice of all that registry disclosed.**

   Where upon its face a negotiable note refers to a deed of trust securing it, a purchaser is put upon notice of the terms of the mortgage showing that the note was one of a series and providing for acceleration of maturity of all the notes upon default in the payment of any one of them.

APPEAL by defendant from *Grady, J.*, and a jury, at March Term, 1930, of DUPLIN. Modified and affirmed.

The judgment of the court below was as follows: "This cause, coming on to be heard, and the jury having returned the following verdict: (1) Did the Bank of Clinton purchase the $2,000 note of J. O. Bizzell from the defendant, and pay for the same, as alleged in the complaint? Answer: Yes. (2) Was the note so purchased the first in the series of unpaid notes to mature, as alleged in the complaint? Answer: Yes. And the defendant having admitted in open court that it held three notes of J. O. Bizzell, each in the sum of $2,000, all secured by mortgage deed on lands in Wayne County; that said lands have been sold under foreclosure, and that it brought $3,500, which money the defendant now has in hand, and the court being of the opinion that the plaintiff, the transferee of said first maturing note is entitled to priority and preference over defendant's transfer to the extent of the amount due on said note, in accordance with the rulings in *Whitehead v. Morrill,* 108 N. C., p. 68, and *Etheridge v. Vernoy,* 74 N. C., 800, it is now ordered and adjudged that the plaintiff recover of the defendant the sum of one thousand and five hundred ($1,500) dollars, with interest on the same from 10 December, 1926, together with the costs of the action to be taxed by the clerk."

The necessary facts will be set forth in the opinion.

R. L. Herring and Butler & Butler for plaintiff.
E. A. Humphrey and George R. Ward for defendant.

CLARKSON, J. On 16 August, 1922, J. O. Bizzell and wife, Iola Bizzell, made and executed a mortgage on certain land to Mary F. Edwards, executrix, which on 28 August, 1922, was duly recorded in the office of the register of deeds of Wayne County, N. C. The mortgage was to secure $11,000, as follows: $1,000 due on or before 1 January, 1923; $2,000 due on or before 1 January, 1924; $2,000 due on or before 1 January, 1925; $2,000 due on or before 1 January, 1926; $2,000 due on or before 1 January, 1927; $2,000 due on or before 1 January, 1928.

The following provision is in the mortgage: "But if default shall be made in the payment of said notes, or either of them or the interest on the same, or any part of either at maturity, then and in that event, all of said notes shall become due, and it shall be lawful and the duty of said party of the second part to sell said land hereinbefore described, to the highest bidder, for cash, at the courthouse door in Wayne County, first advertising the same for thirty days in some newspaper published in Wayne County, and convey the same to the purchaser in fee simple, and out of the moneys arising from said sale to pay said notes and interest on the same, together with costs of sale, and pay any surplus, if any, to said parties of the first part, or their legal representatives."

All the notes have been paid except $5,500, which were transferred to defendant bank, as trustee for the estate of Mr. Edwards by Mrs. Mary F. Edwards, executrix. The controversy is over the following note:

"$2,000. GOLDSBORO, N. C.

On or before 1 January, 1926, we promise to pay Mary F. Edwards, executrix, the sum of two thousand dollars, with interest from date, at the rate of six per cent per annum, payable annually, for value received. This note is secured by mortgage deed on real estate of even date. This 16 August, 1922.

J. O. BIZZELL. (Seal.)
Witness: Z. T. BROWN. IOLA BIZZELL. (Seal.)"

Five hundred dollars was paid on this note on 2 January, 1926. The defendant was pressing J. O. Bizzell for the balance due on the note of $1,500 and interest. Bizzell made arrangements with plaintiff bank to take up the note from defendant bank. This was done on 11 October, 1926, Bizzell paying plaintiff bank the interest, $85. No part of the $1,500 has been paid the plaintiff bank by Bizzell. The contention of plaintiff on the first issue was to the effect that it had purchased from defendant the $2,000 note, balance due on same $1,500. This was denied by defendant, the defendant claiming that the plaintiff paid the note for Bizzell and the money sent defendant bank, $1,570 by plaintiff bank, was a payment of the note.

It was admitted that the note in controversy was not canceled by defendant bank, but "transferred without recourse" by the president of defendant bank, and plaintiff sent defendant the principal and interest due on the note, $1,570. The defendant contends that there was no evidence to go to the jury as to the bargain and sale of the note. We cannot so hold. We think the transfer on the note, with other evidence, sufficient to be submitted to the jury. We think it unnecessary to set forth the evidence.

The main contention, and only one we think material: Would the purchaser, taking without recourse from the assignee of a series of notes secured by mortgage, the first in the series of unpaid notes due and others to mature, be entitled to payment in full by the trustee selling in default under the terms of the mortgage, to the prejudice of the other notes in the series, or should the note share *pro rata?* We think under the terms of the mortgage and the facts and circumstances of the case, the notes share *pro rata.*

Including the $1,500 in controversy, the two last notes due 1 January, 1927, and 1 January, 1928, each for $2,000 are unpaid, making a total of $5,500. The land was sold under the mortgage on 23 May, 1927, in accordance with its terms, and purchased by defendant trustee for $3,500, and deed made to it 17 June, 1927.

In *Raper v. Coleman,* 192 N. C., at p. 235, speaking to the subject: "Our conclusion is in agreement with former decisions of this Court. In

Kitchin v. Grandy, 101 N. C., 86, it is said that where several notes due at different dates are secured by a mortgage or deed in trust wherein it is provided that upon default in the payment of any one of them the mortgagee or trustee may sell, and he does sell after the first note is due and before the maturity of the others, the proceeds must be applied ratably to all the notes remaining unpaid. To the same effect is *Whitehead v. Morrill,* 108 N. C., 65."

It is contended by plaintiff "The transferee of said first maturing note is entitled to priority and preference over defendant's transferer to the extent of the amount due on said note, and in accordance with the rulings in *Whitehead v. Morrill,* 108 N. C., p. 68, and *Etheridge v. Vernoy,* 74 N. C., 800." We cannot so hold under the facts and circumstances of the case. It is admitted that defendant was the owner of the three notes by transfer from the payee, Mary F. Edwards, executrix. Defendant transferred the note due 1 January, 1926, of $2,000, balance due on same $1,500, to plaintiff "without recourse." The note on its face showed "This note is secured by mortgage deed on real estate of even date." Plaintiff had notice from this of the terms of the mortgage. *Wynn v. Grant,* 166 N. C., 45; *Mills v. Kemp,* 196 N. C., 309.

In 20 R. C. L., "Notice," p. 353: "Where a person is charged with notice, or actually knows, of an instrument, he is also charged with notice of all facts appearing on the face of the instrument or to the knowledge of which anything there appearing would conduct him."

Plaintiff became bound by the terms of the mortgage. In matters of this kind, parties may contract as they see fit, but the sale by defendant to the plaintiff of the note gave him, under the terms of the mortgage, a right to *pro rate* and no more. If defendant had endorsed the bond, nothing else appearing, it may be it might then be liable as an endorser, but it did not do this. The note was signed "without recourse," and it shared with defendants' notes, under the terms of the mortgage, on a *pro rata* basis. The facts are meagre in the *Etheridge case, supra,* and we cannot find where it has ever been cited. It may be noted in that case the bond was assigned, but not "without recourse," and the provisions of the mortgage are not set forth. The dictum in the *Whitehead case* is as follows: "If the payee himself held the later bonds unassigned, in a contest between him and the holder of the earlier bonds assigned by him, the assignees of the earlier bonds would be entitled *to be paid in full by virtue of the liability by reason of the endorsement.*" (Italics ours.) But the endorsement here was "without recourse."

The dictum in the *Whitehead case,* under the provision in the mortgage and facts in the present case, is not contrary to the position here taken. It may be noted that the able counsel for plaintiffs in the first complaint prayed "Judgment against the defendants in the sum of

$954.54, with interest thereon from 4 June, 1927 (date of sale 23 May, 1927), that said sum be declared a trust fund in the hands of defendants and that they be required to pay the same over to plaintiff, together with the costs of this action." This prayer was for the *pro rata* amount.

In the amended complaint they pray for judgment against the defendant for the sum of $1,500, etc. Matters of this kind are largely contractual and on the facts of this case we think the fund from the mortgage sale should be prorated.

For the reasons given, the judgment of the court below is

Modified and affirmed.

THE CORPORATION COMMISSION OF NORTH CAROLINA v. THE STOCKHOLDERS OF THE BANK OF BEULAVILLE.

(Filed 22 October, 1930.)

1. **Banks and Banking J a—It will be presumed that Corporation Commission approved of consolidation of banks under C. S., 217(k).**

   Where under the provisions of C. S., 217(k), a State bank under jurisdiction of the Corporation Commission has transferred its assets to another State bank, the latter assuming the former's liabilities under a consolidation agreement, it will be presumed that the Corporation Commission had notice or knowledge of the transaction coming within the scope of its duties, and had approved of the transaction as the statute requires.

2. **Banks and Banking H a—Right to assess stockholders for statutory liability held barred by lapse of time in this case.**

   Where a State bank transfers all its assets to another State bank which assumes the former's liabilities, effecting a consolidation under the provisions of C. S., 217(k), and the transferee bank later becomes insolvent, and is taken over by the Corporation Commission as liquidating agent, the right to assess the stockholders of the transferer bank on their statutory liability to cover the deficiency in its assets to pay its liabilities, for which it was liable to the transferee bank under the agreement of consolidation, is barred when the proceedings for the assessment are instituted more than three years after the transfer. In the instant case, C. S., 240, is not applicable, no receiver having been appointed for the transferer bank, and the transfer being made before the enactment of chapter 113, Public Laws of 1927. As to whether the Corporation Commission had the power to take possession of the transferer bank, *quære?*

APPEAL by the Corporation Commission of North Carolina from judgment of *Grady, J.*, at Chambers, 13 June, 1930. From DUPLIN. Affirmed.

This is a proceeding for the assessment of stockholders of the Bank of Beulaville on account of their statutory liability. C. S., 218(c), subsection 13.

Prior to 21 December, 1926, the Bank of Beulaville, a corporation organized under the laws of this State, was engaged in the banking business at Beulaville, Duplin County, N. C. On said day, the said corporation transferred its assets and liabilties to the Farmers Bank and Trust Company of Wallace, in said county, as it was authorized to do by the law then in force. Section 12, chapter 4, Public Laws 1921. The corporation was not formally dissolved, but it ceased to do business on said day, and since said day it has had no assets, and has done no business as a bank or otherwise.

The Farmers Bank and Trust Company has paid all the debts and liabilities of the Bank of Beulaville, but has not collected from the assets transferred to it by said bank, sufficient sums of money to reimburse itself for all the money paid out for that purpose. There are balances now due to the Farmers Bank and Trust Company on account of the debts and liabilities of the Bank of Beulaville, which it has paid by reason of its agreement with said bank, at the date of the transfer of its assets to the said Farmers Bank and Trust Company. The directors of the bank of Beulaville guaranteed that the value of its assets was sufficient for the payment of its liabilities, and executed a bond to indemnify the Farmers Bank and Trust Company against loss by reason of its payment of the debts and liabilities of the Bank of Beulaville.

In May, 1928, the Farmers Bank and Trust Company closed its doors and ceased to do business. Under the provisions of C. S., 218(c), the Corporation Commission of North Carolina took possession of the Farmers Bank and Trust Company for the purpose of liquidating its affairs. The said Commission is now engaged in such liquidation. Among the assets of the Farmers Bank and Trust Company, now in the hands of the Corporation Commission, is its claim for sums of money paid out by it on account of the debts and liabilities of the Bank of Beulaville, in excess of sums collected from the assets of said bank.

On 10 February, 1930, the Corporation Commission of North Carolina filed in the office of the clerk of the Superior Court of Duplin County notice that under and by virtue of subsection 3, C. S., 218(c), the said Commission had taken possession of the Bank of Beulaville, for the purpose of its liquidation, "for the reason that on or about 21 December, 1926, the said banking corporation began a voluntary liquidation of its affairs, and that said voluntary liquidation has been completed save and except as to its liability to the Farmers Bank and Trust Company of Wallace, N. C., and for the reason that the Bank of Beulaville cannot now meet the said liability."

On 19 April, 1930, the Corporation Commission filed in the office of the clerk of the Superior Court of Duplin County notice that the said Commission had assessed each of the stockholders of the Bank of Beulaville the full amount for which the said stockholder was liable under 219(a). The said clerk of the court recorded said assessments on the judgment docket in his office on 30 April, 1930. In apt time, in accordance with the provisions of subsection 13 of C. S., 218(c), certain of said stockholders appealed from the assessments made against them to the Superior Court of Duplin, contending that said assessments are invalid, for that the Corporation Commission had no power to make the same, and that in any event, the right to make said assessments was barred by lapse of time. Upon the hearing of said appeal, the facts were found by the court, and on these facts the court was of opinion that the assessments could not be sustained. In accordance with this opinion, it was ordered and adjudged that the assessments be canceled by the clerk of the Superior Court of Duplin County, on the judgment docket in his office, and that same be stricken from the records in said office.

From this judgment the Corporation Commission appealed to the Supreme Court.

I. M. Bailey and Beasley & Stevens for Corporation Commission.
R. D. Johnson and J. T. Gresham, Jr., for stockholders.

CONNOR, J. The statute applicable to the Bank of Beulaville on 21 December, 1921, and to other banks doing business in this State at said date, with respect to a transfer of its assets and liabilities by one bank to another bank, is section 12 of chapter 4, Public Laws of North Carolina, 1921, now C. S., 217(k). It is provided therein that "a bank may consolidate with or transfer its assets and liabilities to another bank." It is further provided therein that "no such consolidation or transfer shall be made without the consent of the Corporation Commission." There is no finding of fact in the instant case, that such consent was sought or obtained. It is, however, alleged by the stockholders of the Bank of Beulaville, and not denied by the Corporation Commission, that the transfer of its assets and liabilities by the Bank of Beulaville to the Farmers Bank and Trust Company, on 21 December, 1921, was made with the consent and approval of the Corporation Commission. Both the Bank of Beulaville and the Farmers Bank and Trust Company, at the date of the transfer, were under the supervision of the Corporation Commission. It must be presumed that in the performance of its duties as prescribed by statute, the Corporation Commission had knowledge of the transfer. It will not be presumed that a State agency, such as the Corporation Commission, with knowledge that the transfer had been made, and that the Bank of Beulaville had ceased to do business, permitted the transfer to become effective, without its approval. *Bank v. Bank,* 198 N. C., 477, 152 S. E., 403. Under the statute, the consent and approval of the Corporation Commission could be given only after an examination of both banks by the Corporation Commission had disclosed that the interests of depositors, creditors, and stockholders would be protected, and that the transfer was for legitimate purposes. It is finally provided by the statute that "in case of either transfer or consolidation the rights of creditors shall be preserved unimpaired, and the companies deemed to be in existence to preserve such rights for three years." The implication is, that after the expiration of three years from the date of the transfer, the existence of the corporation making the transfer ceases, at least in so far as creditors are concerned. The creditors of a bank which has transferred its assets and liabilities to another bank, under the authority of the statute, and those claiming under them, are therefore barred from maintaining any action or proceeding against the bank or its stockholders after the expiration of three years from the date of the transfer.

While probably not applicable to the instant case, because not enacted until after the transfer involved herein, see section 4, chapter 47, Public Laws 1927, as amended by chapter 73, Public Laws 1929, wherein it is provided that the purchasing bank may institute suit against the stockholders of the selling bank to recover amounts due on their statutory liability at any time within three years from the date of the sale and transfer.

Prior to the enactment of chapter 113, Public Laws of North Carolina, 1927, now C. S., 218(c), subsection 13, the Corporation Commission had no power, by assessment, to enforce the statutory liability of stockholders of a banking corporation organized under the laws of this State. It had power only to take possession of such corporation, upon certain contingencies, and to apply to a court of competent jurisdiction for the appointment of a receiver of the corporation. The receiver appointed by the court, and subject to its jurisdiction, had power to enforce the statutory liability of the stockholders by applying to the court to make assessments against them. *Corp. Com. v. Murphey,* 197 N. C., 42, 147 S. E., 667; *Corp. Com. v. Bank,* 193 N. C., 113, 136 S. E., 362; *Corp. Com. v. Bank,* 192 N. C., 366, 135 S. E., 48. After the assessments had been made by the court, an action by the receiver for judgment against the stockholders for the amounts due by them was not barred until the expiration of ten years from the date of the assessment. C. S., 240. See *Litchfield v. Roper,* 192 N. C., 202, 134 S. E., 651. In the instant case no receiver has been appointed, and C. S., 240, is not applicable. It is applicable only to an action brought by the receiver of an insolvent banking corporation to recover judgment for the amount due by a stockholder on an assessment made against him by a court, under the procedure which obtained in this State prior to the enactment of chapter 113, Public Laws 1927.

Whether or not the Corporation Commission has the power, under C. S., 218(c) to take possession of a banking corporation organized under the laws of this State, which prior to the enactment of chapter 113, Public Laws of 1927, had with its consent and approval transferred all its assets and liabilities to another bank, and ceased to do business, as authorized by statute, and to proceed with the liquidation of such corporation, need not be decided in the instant case. In any event, this proceeding against the stockholders of the Bank of Beulaville cannot be maintained, for that the proceeding was not begun until more than three years had elapsed from the date of the transfer by the Bank of Beulaville to the Farmers Bank and Trust Company of all its assets and liabilities. There was no error in the judgment.

G. M. WINFREE, ADMINISTRATOR OF W. C. WINFREE, DECEASED, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 22 October, 1930.)

1. **Railroads D c—Evidence of railroad's negligence in causing death to person on tracks held insufficient to be submitted to the jury.**

Where, in an action against a railroad company for damages for the negligent killing of the plaintiff's intestate, the evidence tends to show that the intestate was employed as a watchman at a public crossing where the defendant had several tracks, that immediately after stopping work at night the plaintiff's intestate, instead of leaving by a street, assumed to walk up the defendant's tracks, and was killed by defendant's northbound passenger train running on the track for southbound trains, that the change in the use of the tracks was made necessary by condition of the track ahead, and that the train which struck the intestate had its headlight lit and gave all the usual warnings and signals, and that there were several places which the intestate could have reached and been in safety, is *held*, insufficient to establish the alleged negligence of the defendant in running its northbound train on its southbound track without notice to the intestate, as a proximate cause of the injury, and defendant's motion as of nonsuit was properly granted, there being no evidence that the defendant was under duty to warn the intestate of the change, and there being evidence that the intestate knew or should have known thereof.

2. **Negligence B b—Where evidence fails to establish plaintiff's negligence as proximate cause of injury, nonsuit is proper.**

In an action to recover damages for an alleged negligent injury, the plaintiff must establish the alleged negligence of the defendant as the proximate cause of the injury, and where the evidence leads only to conjecture and speculation the defendant's motion as of nonsuit is properly allowed.

3. **Master and Servant E b—Under Federal Employers' Liability Act an employee assumes ordinary risks and obvious negligence of defendant.**

Under the Federal Employers' Liability Act an employee not only assumes the ordinary risks of his employment, but also such risks as are due to the defendant's negligence when they are obviously known and appreciated by him.

4. **Same—Evidence of employee's assumption of risk held sufficient to sustain defendant's motion as of nonsuit.**

Where in an action under the Federal Employers' Liability Act there is evidence that the plaintiff's intestate chose to walk along the defendant's tracks, when he might have used a public street, that he was aware of the approach of defendant's train, that there were several places of safety along the track, and that he must have realized the danger, he is deemed to have assumed the risk of injury, and his administrator may not recover against the railroad on the ground that the intestate was struck by a northbound train on the southbound track, it not being shown that the defendant should have warned the intestate of the change in the schedule made necessary by repairs, and there being further evidence that the intestate knew or should have known of the change.

APPEAL by plaintiff from *Daniels, J.*, at March Term, 1930, of WAKE. Affirmed.

The plaintiff brought suit to recover damages for the death of his intestate alleged to have been caused by the negligence of the defendant. At the close of the plaintiff's evidence the action was dismissed as in case of nonsuit and the plaintiff appealed. C. S., 567.

Clyde A. Douglass and Thos. H. Ruffin for appellant.
Murray Allen for appellee.

ADAMS, J. The death of the plaintiff's intestate occurred a few minutes after ten o'clock at night on 15 August, 1929. He was employed by the defendant as extra watchman at Johnson Street crossing in the city of Raleigh and was charged with the duty of preventing persons and vehicles from going upon the defendant's tracks when trains were approaching. His hours of service were between two in the afternoon and ten at night. He lived on Glenwood Avenue and at the time of his death was on his way home.

At and near the place of the accident the defendant has three parallel tracks: on the east is the northbound track; west of it, the southbound;

and west of the southbound track is another known as the cinder track. They run north and south and are intersected by several streets in the vicinity, which extend east and west.

A clerk in the defendant's storeroom at Johnson Street saw the deceased leave his station on the north side of this street and walk toward the south on the railroad yard. In a few minutes the defendant's northbound train ran in on the southbound track; "the bell rang, the whistle blew, and the train stopped in about two and a half car lengths." The body of the deceased was found between the southbound track and the cinder track, 250 feet north of the North Street crossing and 250 or 300 feet from the crossing at Johnson Street.

For several years the defendant's employees had been accustomed to use the railway tracks and the space between the tracks in going to and from their work. Between the nearest rails of the two tracks the distance is about six feet and between the ends of the cross-ties about four. Several witnesses testified that a person can walk between the tracks in no danger of being struck by a passing train; but there is evidence that it would be impossible for one to stand between the tracks without being struck if a train passed by. It was testified that the deceased could have reached his home by going on Johnson Street without walking on the roadbed; also that Johnson Street is not in good condition.

The northbound train customarily used the east or northbound track, but on this occasion it ran on the west or southbound track because the construction of an underpass at Peace Street made its use necessary. A person standing on either track near the place of the accident and facing the glare of the headlight on an engine coming from the south could not definitely determine the track the train was on. But "there was room to get entirely off the tracks on the south side."

It was in evidence that the speed of the train was 35 or 40 miles an hour; that a signal was given at Jones Street four or five blocks away; that the noise was heard at this distance; that the train was known to be coming when 1,680 feet distant; and that the bell was ringing when the train ran into the yard. The headlight was burning. A witness testified that from the place where the body of the deceased was found one could see the headlight 500 feet away, and that there were several contiguous places of safety.

Actionable negligence involves three essential elements: the existence of a duty on the part of the defendant to protect the plaintiff from injury; failure of the defendant to perform this duty; and injury to the plaintiff proximately resulting from such failure.

Granting that there is evidence of negligence in the operation of the train in breach of the city ordinance, or in disregard of the duty to give the usual signals, or at an excessive rate of speed, we do not discover any sufficient evidence that any of these alleged acts was the proximate cause of the intestate's injury and death. *Bowers v. R. R.,* 144 N. C., 684; *Clark v. Wright,* 167 N. C., 646.

It is contended, however, that the defendant was negligent in that, without notifying the deceased, it operated the northbound train on the southbound track contrary to an established custom to run the northbound train on the northbound track. In considering this position we must keep two facts in mind: (1) the deceased was employed to keep watch at a crossing; (2) the use of the southbound track was necessary while the underpass at Peace Street was under process of construction. It does not appear how long the northbound train had been using the southbound track; but it does appear that it was the duty of the deceased to watch the Johnson Street crossing, to notify pedestrians, and to hear approaching trains. There is some evidence that it was his duty to know what track the train was on. No rule of the defendant is shown that watchmen must be notified when a train is transferred from one track to another and no authority is cited by the appellant requiring it as a matter of law.

The appellant cites *New York Cont. R. Co. v. Marcone,* 281 U. S., 345, 74 Law Ed., 419; but in that case there was evidence of a system or custom in the roundhouse of giving warning to the men employed about the engines when they were to be removed from the roundhouse, by posting the time of removal on a blackboard located on the inside of the outer wall of the roundhouse. The warning was required for the specific protection of the deceased and other employees whose place of work was such that any movement of the engine without warning was dangerous to life and limb. In the conflict of evidence it was held that the inference to be drawn was for the jury. That case is not decisive in the present appeal.

The evidence does not disclose the proximate cause of the plaintiff's death, and an effort to determine the exact circumstances under which it occurred leads us into the field of conjecture or speculation. *Austin v. R. R.,* 197 N. C., 319; *Elliott v. R. R.,* 150 U. S., 245, 37 Law Ed., 1068; *Toledo, St. L. & W. R. Co. v. Allen,* 276 U. S., 165, 72 Law Ed., 513.

If, as the appellant contends, the defendant was engaged in and the deceased was employed in interstate commerce, the next question is whether according to the evidence the intestate assumed the risk of his injury and death. Under the Federal Employers' Liability Act the employee assumes, not only the ordinary risks of his employment, but such as are extraordinary or due to the negligence of his employer when they are obvious or fully known and appreciated. *Delaware, L. & W. L. Co. v. Koske,* 279 U. S., 7, 73 Law Ed., 578. If the plaintiff's evidence discloses assumption of risk the action should be dismissed. *Potter v. R. R.*, 197 N. C., 21; *Hinson v. R. R.*, 172 N. C., 646. There is no reason to doubt that the deceased knew the train was approaching or that he was in a place of danger, or that there were several ways of escape, or that walking on or near either track was, under the circumstances, a perilous undertaking, and under these conditions he must be deemed to have assumed the risk of injury. *Toledo, St. L. & W. R. Co. v. Allen, supra; C. & O. R. Co. v. Nixon,* 271 U. S., 218, 70 Law Ed., 914. If the deceased was in the service of the defendant at the time of his injury he was employed in interstate commerce; if his employment had ceased we are of opinion that upon all the evidence the recovery of damages should be denied. In any view of the case the judgment must be affirmed.

Judgment affirmed.

D. S. MILLER v. FARMERS MUTUAL FIRE INSURANCE ASSOCIATION OF NORTH CAROLINA.

(Filed 22 October, 1930.)

1. **Insurance S a—Evidence that cause designated in policy was efficient cause of loss held sufficient to be submitted to the jury.**

   Where in an action on a policy of insurance covering loss to property from windstorms there is evidence tending to show that a windstorm was the dominant, efficient cause of the loss, but that snow was a contributing cause, the evidence is properly submitted to the jury, it being ordinarily sufficient if the cause designated in the policy is the dominant, efficient cause of the loss.

2. **Interest A a—Where in an action against an insurance company the verdict does not award interest, interest is payable from date of verdict.**

   Where in an action on a policy of insurance covering loss to property from windstorms the verdict of the jury does not award interest either as such or as a part of the damages, the judgment should award interest from the date of the verdict and not from the date of the destruction of the property by the cause designated in the policy, and where the judgment awards interest from the latter date the cause will be modified and affirmed.

APPEAL by defendant from *Johnson, Special Judge,* and a jury, at June Term, 1930, of DURHAM. Modified and affirmed.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the plaintiff's building damaged by windstorm as alleged in the complaint? Answer: Yes.

2. If so, what amount is the plaintiff entitled to recover of the defendant? Answer: $1,066, with interest from date."

The court below rendered the following judgment: "This cause coming on to be heard before his Honor, Thomas L. Johnson, and a jury, at the June, 1930, Term of Durham Superior Court, and the jury having answered the issues as set out in the record, it is therefore upon motion of counsel for the plaintiff ordered, considered and adjudged that the plaintiff have and recover of the defendant the sum of $1,066, together with interest thereon from 2 March, 1927, until paid, together with the costs to be taxed by the clerk."

Defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

Fuller, Reade & Fuller for plaintiff.
McLendon & Hedrick for defendant.

CLARKSON, J. This action was here before, 198 N. C., 572. This Court said, at p. 574-5: "The plaintiff's allegation is susceptible of the interpretation that the fall of the roof was caused by the wind and the accumulation of snow upon the house. If the jury should find from the evidence that the windstorm was the efficient cause of the damage and that the snow was contributory, the combined effect would be attributed to the efficient cause, upon the principle that 'it is generally sufficient to authorize a recovery on the policy that the cause designated therein was the efficient cause of the loss, although other causes contributed thereto.' 17 C. J., 694."

Defendant says: Upon the entire record it is respectfully submitted: "1. That the defendant is entitled to a judgment as of nonsuit. 2. That if the defendant is not entitled to a judgment as of nonsuit, a new trial should be awarded the defendant for errors committed during the course of the trial, as set out in the defendant's brief."

We cannot so hold. We think the evidence sufficient to be submitted to a jury. We see no prejudicial or reversible error committed by the court below during the course of the trial. There is no new or novel proposition of law presented on the record. The court below tried the case in conformity with the opinion heretofore rendered in this action. There was an array of witnesses on both sides, eighteen examined for plaintiff and twelve for defendant. Plaintiff contended it was a windstorm that destroyed the building. Defendant contended it was the weight of snow which accumulated on the building, as a result of the snowstorm, and that it was not a windstorm that destroyed the building. It was a question of fact for the jury to determine, and they have decided the facts with plaintiff.

The verdict of the jury was "$1,066, with interest from date." The amount sued for was $1,066.54, with interest from 2 March, 1927, the date of the destruction of the property. From the verdict, the judgment is not justified. The judgment should have been rendered from date the verdict was rendered, not from the time the property was destroyed.

In *Insurance Co. v. R. R.,* 198 N. C., at p. 519, citing numerous authorities, is the following: "The jury awarded no interest, either as such or as a part of the damages, hence, under our decisions, the damages fixed by the jury, being, as they are, for tortious or wrongful destruction of property, do not, as a matter of law, bear interest until after judgment." The judgment in the court below is

Modified and affirmed.

J. M. STORY v. W. B. SLADE, ADMINISTRATOR OF W. E. SLADE, AND C. E. KERNODLE.

(Filed 22 October, 1930.)

Mortgages C c—Prior registered mortgage marked upon its face "second mortgage" is prior to mortgage first executed and later registered.

No notice, however full and formal, can replace the statutory notice of registration as against creditors or purchasers for value, C. S., 3311, and where a mortgage on lands is executed and delivered, but not registered until after the registration of a later executed mortgage, the prior registered mortgage is a first lien on the land, and it is not sufficient to change this result that the prior registered mortgage was marked upon its face "second mortgage." Nor can notice *aliunde* advantage the holder of the mortgage first executed. *Williams v. Lewis,* 158 N. C., 571, cited and distinguished.

APPEAL by defendant, C. E. Kernodle, from *Harris, J.,* at Second May Term, 1930, of ALAMANCE.

Civil action for debt and to foreclose mortgage alleged to be a first lien.

The facts are these:

1. On 26 June, 1928, W. E. Slade (now deceased), being indebted to the plaintiff in the sum of $1,400, as evidenced by his promissory notes, executed and delivered to the plaintiff a mortgage on certain real estate in Alamance County, to secure the payment of said notes at maturity.

2. This mortgage was immediately filed for registration in the office of the register of deeds for Alamance County and spread upon the registry in Book No. 105, page 180, but was neither indexed nor cross-indexed until 9 January, 1930, thereafter, the date of indexing and cross-indexing being noted on the index book.

3. In the meantime, between the filing of plaintiff's mortgage for registration and its indexing, the said W. E. Slade executed and delivered to Dr. C. E. Kernodle another mortgage on the same property to secure an indebtedness of $1,500. This mortgage was duly registered and properly indexed 2 February, 1929.

4. Immediately following the description of the property set out in this instrument are the words "second mortgage."

5. The jury returned the following verdict: "Did the defendant, C. E. Kernodle, take the mortgage mentioned in the answer subject to the lien of the prior mortgage of the plaintiff, as alleged in the reply? Answer: Yes."

From a judgment declaring the plaintiff's mortgage a first and prior lien and ordering that the proceeds arising from a sale of the property be applied accordingly, the defendant, C. E. Kernodle, appeals, assigning as error the refusal of the court to instruct the jury, as requested, that upon all the evidence the issue submitted should be answered "No."

Long & Allen and H. J. Rhodes for plaintiff.
J. Dolph Long for defendant Kernodle.

STACY, C. J., after stating the case: Is a mortgage duly filed for registration and spread upon the registry, but not indexed or cross-indexed as required by C. S., 3561, superior to the lien of a duly registered "second mortgage" on the same property? We think not.

The indexing and cross-indexing of instruments required to be registered is an essential part of their registration. *West v. Jackson,* 198 N. C., 693; *Heaton v. Heaton,* 196 N. C., 475, 146 S. E., 146; *Whitehurst v. Garrett,* 196 N. C., 154, 144 S. E., 835; *Clement v. Harrison,* 193 N. C., 825, 138 S. E., 308; *Bank v. Harrington,* 193 N. C., 625, 137 S. E., 712; *Wilkinson v. Wallace,* 192 N. C., 156, 134 S. E., 401; *Hooper v. Power Co.,* 180 N. C., 651, 105 S. E., 327; *Mfg. Co. v. Hester,* 177 N. C., 609, 98 S. E., 721; *Fowle v. Ham,* 176 N. C., 12, 96 S. E., 639; *Ely v. Norman,* 175 N. C., 294, 95 S. E., 543.

The bare appellation "second mortgage," appearing in the Slade-Kernodle mortgage, falls short of the requirements laid down in *Hardy v. Fryer,* 194 N. C., 420, 139 S. E., 833, for making it subject to the unindexed Slade-Story mortgage. No reference is made to the supposed first mortgage, nor is its holder identified, nor is the amount of it stated, all of which appeared in *Bank v. Smith,* 186 N. C., 635, 120 S. E., 215, and *Bank v. Vass,* 130 N. C., 590, 41 S. E., 791, cases strongly relied upon by plaintiff. The present case, therefore, comes squarely within the decisions in *Hardy v. Abdallah,* 192 N. C., 45, 133 S. E., 195, and *Piano Co. v. Spruill,* 150 N. C., 168, 63 S. E., 723, in which similar references were held to be insufficient to take the place of proper registration of alleged prior encumbrances. See, also, *Blacknall v. Hancock,* 182 N. C., 369, 109 S. E., 72.

Nor can notice *aliunde* to the holder of the "second mortgage" of the existence of a prior encumbrance avail the holder of the unregistered "first mortgage." C. S., 3311, in effect provides that no deed of trust or mortgage shall be valid as against creditors or purchasers for value but from the proper registration thereof, and we have insistently held that no notice, however full or formal, will suffice to defeat a prior registration. *Ellington v. Supply Co.,* 196 N. C., 784, 147 S. E., 307; *Quinnerly v. Quinnerly,* 114 N. C., 145, 19 S. E., 99.

The case of *Williams v. Lewis,* 158 N. C., 571, 74 S. E., 17, cited by plaintiff, is not at variance with our present position. That decision was controlled by other principles.

It would seem that appellant was entitled to have the jury instructed, as requested, to answer in the negative the issue submitted.

New trial.

STATE v. WILL SLOAN.

(Filed 22 October, 1930.)

1. **Criminal Law I g—Instruction in this case as to admissions of defendant held not erroneous.**

   On defendant's appeal from a conviction of murder, his admission on cross-examination that he had been on the roads and "they claimed I took an automobile," is not sufficiently different from an instruction, "the defendant admits a criminal record more or less, and that he was convicted of larceny" to make the statement in the charge reversible error.

2. **Same—Misstatement of admissions of defendant in charge must be brought to court's attention in apt time.**

   An error made by the judge in misstating exactly an admission in his charge to the jury, must be brought to his attention in order to afford time and opportunity for correction.

APPEAL by defendant from *Grady, J.,* at August Term, 1930, of PERSON.

Criminal prosecution tried upon an indictment charging the prisoner with the murder of one Phœbie Gillis.

The evidence on behalf of the State tends to show that during the night of 9 April, 1930, or the early morning of 10 April, the prisoner, Will Sloan, a colored man, burglariously entered a dwelling-house in Person County, murdered Phœbie Gillis, one of the occupants therein, by shooting her in the back as she fled from his assault, or threatened violence, ravished Mary Lee Gillis, another occupant of the house, successfully made his escape, and was arrested some time thereafter.

The prisoner denied all knowledge of the crime, and offered evidence tending to establish an alibi. On cross-examination, he admitted that he had run away from South Carolina in 1925. "I ran away off the chain-gang. I was on the county roads of Richmond County. They claimed I took an automobile. I have been up for reckless driving and speeding, and on a charge of murder once, but was not convicted."

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

The prisoner appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

R. B. Dawes and B. I. Satterfield for defendant.

STACY, C. J., after stating the case: Error is assigned because the trial court, in charging the jury, stated "the defendant admits he has a criminal record, more or less; that at one time he was convicted of larceny," etc., whereas the admission made by the prisoner was that he had been on the roads of Richmond County and "they claimed I took an automobile." The assignment is without merit. The court's statement is warranted by the cross-examination of the prisoner. There is no practicable difference between the defendant's testimony and the court's interpretation of it. For the court to say that the defendant admitted he had been convicted of larceny when his admission was that he had been on the roads charged with taking an automobile, could, in no event, be held for reversible error.

Furthermore, the prisoner having omitted to call the matter to the court's attention, at the proper time, so as to afford an opportunity to remove the objection, if any really existed, may not now, after verdict, challenge its correctness. *S. v. Parker,* 198 N. C., 629.

The remaining exceptions are equally untenable.

No error.

STATE v. C. H. HARVELL ALIAS CHARLIE HARVELL.

(Filed 22 October, 1930.)

1. Criminal Law J e—Motion to set aside judgment as against the weight of the evidence is addressed to discretion of trial court.

A motion to set aside a verdict in a criminal action on the ground that it is against the weight of the evidence is addressed to the sound discretion of the trial court, and his action is not reviewable on appeal in the absence of abuse.

2. Criminal Law I f—Court has power to consolidate actions, and upon general verdict of guilty to enter judgment on each offense.

Where the trial of two separate criminal indictments are consolidated by the judge and tried together as authorized by C. S., 4622, and a general verdict of guilty is returned by the jury, the verdict will apply to each indictment, and judgment pronounced on one of them, but execution suspended on terms agreed upon, and judgment and sentence entered as to the other, is not objectionable on the ground that only one judgment should have been entered, and *held* further, the sentences being concurrent, the defendant was not prejudiced.

APPEAL by defendant from *Cranmer, J.*, at April Term, 1930, of BRUNSWICK. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

R. M. Kermon for defendant.

ADAMS, J. Two bills of indictment were returned against the defendant charging him with a violation of the prohibition law on 5 August, 1929, and 30 March, 1930, respectively. Without objection the indictments were tried together, and on each the defendant was convicted. In the first, judgment was pronounced, but execution was suspended upon terms to which the defendant consented; in the second, the defendant was sentenced to imprisonment and to the roads.

The record contains only two exceptions. The first relates to the refusal of the judge to set aside the verdict on the ground that it was contrary to the weight of the evidence—a matter within the discretion of the judge and not reviewable on appeal when not abused. *Hoke v. Tilley,* 174 N. C., 658; *Bailey v. Mineral Co.,* 183 N. C., 525.

The second exception is that as both indictments were tried together only one judgment should have been pronounced. The defendant was tried upon distinct indictments which the trial court was authorized to consolidate. C. S., 4622.

Where there are several counts and each is for a distinct offense, a general verdict of guilty will apply to each and judgment may be pronounced on each count. *S. v. Mills,* 181 N. C., 530. In any event since the sentences are concurrent the defendant was not prejudiced in this respect.

No error.

STATE v. WILLIE MASSEY.

(Filed 22 October, 1930.)

Criminal Law L a—Where appeal in capital case is not prosecuted according to Rules it will be dismissed, no error appearing upon face of record.

Where the prisoner convicted of a capital felony is allowed to appeal *in forma pauperis,* and an agreed case on appeal has been filed, but no further steps taken, the appeal will be dismissed on motion of the Attorney-General for noncompliance with the Rules of Court governing appeals, after an examination of the record and the case for substantial error.

MOTION by State to affirm judgment and dismiss appeal.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Walter B. Bass and Clarence L. Lynn for defendant.

STACY, C. J. At the May Term, 1930, Durham Superior Court, the defendant herein, Willie Massey, was tried upon indictments charging him (1) with the murder of one Floyd Moore, and (2) with the murder of one Dora Moore, which resulted in convictions of murder in the first degree in the first case, and murder in the second degree in the second case, and a sentence of death pronounced on the capital conviction. From the verdict rendered in the first case and judgment entered thereon, the defendant gave notice of appeal to the Supreme Court, but this has not been prosecuted as required by the rules, albeit he was allowed to appeal *in forma pauperis.*

The case on appeal was settled by agreement 3 October, 1930, and filed here 11 October, 1930. Nothing more has been done. The motion of the Attorney-General must be allowed *(S. v. Taylor,* 194 N. C., 738, 140 S. E., 728), but this we do only after an examination of the record and the case, as the life of the prisoner is involved. *S. v. Ward,* 180 N. C., 693, 104 S. E., 531.

The assignments of error, appearing on the record, are without substantial merit, hence the judgment will be affirmed and the appeal dismissed.

Judgment affirmed. Appeal dismissed.

W. L. McCOY v. J. B. JUSTICE, ADMINISTRATOR OF THE ESTATE OF PERRY HYATT, DECEASED, ET AL.

(Filed 22 October, 1930.)

1. **Judgments K c—Judgment may be set aside for extrinsic fraud, but not for intrinsic fraud affecting matters in issue.**

   Equity will not ordinarily set aside a judgment for intrinsic fraud in the trial of the action, such as false swearing, conspiracy to defraud, etc., since such matters relate to the issues joined in the trial and should have been met in the trial by the use of such diligence as is required of a defendant, but a judgment may be set aside only for extrinsic fraud or fraud relating to matters which are not in issue and which prevent the defendant from presenting his defense and which prevent a real contest in the trial in which the judgment sought to be vacated was rendered.

2. **Same—In this case evidence was to intrinsic fraud for which equity will not set aside a judgment.**

   Where in a suit to set aside a judgment obtained against the defendant for criminal conversation and the alienation of the affections of the plaintiff's wife, the allegation and proof are that the husband and wife and others conspired together to conceal the fact that the husband and wife continued to live together and that he continued to support her until the action at law had terminated contrary to the evidence in that case, with other evidence of false swearing: *Held*, the allegations and evidence are to intrinsic fraud for which equity will not set aside a judgment, and judgment as of nonsuit was properly entered.

3. **Same—In a suit to set aside a judgment the exclusion of former pleadings of the parties tending to show false swearing is immaterial.**

   While pleadings in an action may be competent in proper instances upon another trial between the same parties to contradict the evidence introduced in the later action, its exclusion is immaterial and not reversible error when the later suit is in equity to set aside the judgment in the former action, and the pleadings are to matters constituting intrinsic fraud for which equity will not grant the relief demanded.

4. **Same—In a suit to set aside a judgment exclusion of evidence tending to show intrinsic fraud held harmless.**

   Although the declarations of one of the parties to an unlawful conspiracy are ordinarily admissible against the other conspirators when made in furtherance of the common scheme, in a suit to set aside a judgment, the exclusion of a part of a deposition relating to a conspiracy between the former plaintiff and his wife to obtain money by bringing suit for alienation of the affections of the wife, is to an agreement to commit perjury and is to intrinsic fraud for which equity will not set aside a judgment, and *held further*, its exclusion was harmless, the substance of the excluded testimony being brought out on cross-examination.

5. **Same—Newly discovered evidence will not be considered in suit to set aside a judgment for fraud.**

Newly discovered evidence is a ground for a motion for a new trial in an action at law, and will not be considered in a suit in equity to set aside a judgment for fraud, the newly discovered evidence being intrinsic to the issues involved in the action at law.

6. **Evidence D e — Testimony of communications between husband and wife held properly excluded in this case.**

In a suit in equity to set aside a judgment rendered in an action at law for fraud, letters from the plaintiff in the former action to his wife respecting fraud in that action are properly excluded when the letters are obtained by a third party with the consent of the wife, the letters being privileged communications, C. S., 1801, and inadmissible against either the husband or the wife.

Appeal by plaintiff from *Harwood, Special Judge,* at October Special Term, 1929, of Macon. Affirmed.

The suit was brought to set aside and declare invalid on the ground of fraud and collusion a judgment recovered against the plaintiff by Perry Hyatt, deceased.

The plaintiff is a resident of Macon County. The defendants are Perry Hyatt's administrator, his widow, his mother, his brothers and sisters, and the sheriff of Macon County.

Perry Hyatt and Annie Hyatt were husband and wife. They were married in 1912. On 12 August, 1925, Perry Hyatt, then in the employ of W. L. McCoy, plaintiff in this action, suffered personal injury which resulted in partial paralysis. He died 24 March, 1927. No child was born of the marriage. Annie Hyatt became pregnant in December, 1925, and gave birth to a child in August, 1926. In June, 1926, her husband discovered her condition and she immediately left his home. On 28 June, 1926, Perry Hyatt instituted an action against W. L. McCoy to recover damages for criminal conversation with Annie Hyatt, and the alienation of her affections. He was given a judgment which was affirmed on appeal to this Court. *Hyatt v. McCoy,* 194 N. C., 760. Execution was issued and the plaintiff brought suit to set aside the judgment on the grounds above stated.

A summary of the pleadings is necessary to an understanding of the exceptions. The plaintiff alleges that Perry Hyatt and his wife, aided by the defendants, other than Caroline Hyatt and C. L. Ingram, formed a conspiracy to cheat and defraud the plaintiff, and for this purpose caused an action to be brought against him in the name of Perry Hyatt for debauching Annie Hyatt and alienating her affections; that Perry Hyatt recovered a judgment; that an action was brought by Annie, whose complaint was demurred to and held to be insufficient; that the plaintiff paid Perry and his wife $2,000; that in pursuance of their conspiracy these two agreed to separate and live apart until Perry's suit was finally disposed of; that there was a pretended, but not an actual, separation between them; that Perry provided for his wife money, board, and clothing; that her affections were never alienated; that some of the defendants kept away from the trial three or four witnesses who were material for the defense and made arrangements with jurors to render a verdict favorable to the plaintiff in that action; that the plaintiff (McCoy) was diligent in his defense, but did not prevail because of the alleged fraud and conspiracy; that he first learned of the fraud after the judgment of the Superior Court had been affirmed on appeal; that the allegation that Perry and his wife lived happily together was false, their marital relations having previously been disturbed by her infidelity; that two of the defendants intimidated the plaintiff's witnesses; that the plaintiff received information when Annie instituted a proceeding against the administrator for a settlement of the estate; that the alleged agreement between her and her husband was a sham; and that the allegations in Perry's complaint, as well as his testimony at the trial, were fabricated and untrue.

The answers put in issue all the material allegations relating to the alleged conspiracy, fraud, deceit, interfering with jurors and intimidating witnesses and other allegations, the establishment of which is necessary to enable the plaintiff to recover. Annie Hyatt alleges in her answer that she does not own or claim any interest in the estate of her husband.

At the close of the plaintiff's evidence the defendants moved to dismiss the action as in case of nonsuit. The motion was allowed, and the plaintiff excepted and appealed upon assignments of error referred to in the opinion.

A. Hall Johnston, Edwards & Leatherwood and Moody & Moody for plaintiff.

Bryson & Bryson and Geo. H. Patton for defendant.

Adams, J. This is a suit in equity brought by the plaintiff to restrain the issuance of an execution and to set aside a judgment recovered against him by Perry Hyatt, now deceased, in an action at law. The grounds upon which relief is sought are an alleged conspiracy between Perry Hyatt and his wife, aided by his brothers and sisters, who are defendants and who claim to be distributees of his estate, fraudulently to procure the judgment by perjured testimony and the creation of feigned conditions which are specifically set forth in the complaint. For this reason resort is had to the equitable jurisdiction of the court on the principle that the plaintiff's wrongs can be redressed and his rights enforced only by such remedial justice as is administered exclusively in courts of equity. It is true that if the remedy afforded at law would be incomplete or inadequate equity will always entertain jurisdiction to give relief in a case of fraud. But fraud is a generic term. While several definitions of the word have been given, it has often been said that no definition can be framed which will be all-inclusive, and that each case must be determined on its own facts. The principle is directly applicable in the present case.

In a discussion of the conditions under which a judgment obtained by fraud may be vacated by a court of equity Freeman in his work on "Judgments," observing the distinction between intrinsic and extrinsic fraud, remarks that "extrinsic or collateral fraud operates not upon matters pertaining to the judgment itself, but relates to the manner in which it is procured." He illustrates the definition by the following excerpt from "the oft-quoted statement of *Justice Miller*" in *United States v. Throckmorton,* 98 U. S., 61, 25 Law Ed., 93: "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently and without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and fair hearing."

Freeman refers to perjury and false swearing as intrinsic fraud (sec. 1241), and says: "It must be borne in mind that it is not fraud in the cause of action, but fraud in its management, which entitles a party to relief. The fraud for which a judgment may be vacated or enjoined in equity must be in the procurement of the judgment. If the cause of action is vitiated by fraud, this is a defense which must be interposed, and unless its interposition is prevented by fraud, it cannot be asserted against the judgment; 'for judgments are impeachable for those frauds only which are extrinsic to the merits of the case, and by which the court has been imposed upon or misled into a false judgment. They are not impeachable for frauds relating to the merits between the parties. All mistakes and errors must be corrected from within by motion for a new trial, or to reopen the judgment, or by appeal.' The fraud must be in some matter other than the issue in controversy in the action. The rule that fraud, to be a ground for relief, must be extrinsic or collateral to the matter tried in the first action, is almost universally acquiesced in. It is merely an application of the general principle that equity will not interfere simply to give a second opportunity to relitigate that which has already been fully litigated." Freeman on Judgments (5 ed.), sec. 1233.

The objection to relitigation rests upon solid ground. As observed by *Mr. Justice Miller:* "If the court has been mistaken in the law, there is a remedy by writ of error. If the jury has been mistaken in the facts, there is the same remedy by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are parts of the same proceeding, relief is given in the same suit, and the party is not vexed by another suit for the same matter. So in a suit in chancery, on proper showing, a rehearing is granted. If the injury complained of is an erroneous decision, an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final, a bill of review on that ground may be filed within the rules prescribed by law on that subject. Here again, these proceedings are all part of the same suit and the rule framed for the repose of society is not violated."

The principle was concisely stated in *Tovy v. Young,* Prec. in Ch., 193, 24 Eng. Reports, 93, in which the Lord Keeper, dismissing a bill to set aside a judgment, said: "New matter may in some cases be ground for relief; but it must not be what was tried before; nor when it consists in swearing only, will I ever grant a new trial, unless it appears by deed or writing, or that a witness, on whose testimony the verdict was given, were convicted of perjury, or the jury attainted."

This was followed by *United States v. Throckmorton, supra,* in which the Supreme Court stated the principle that relief may be given to a party against whom a judgment has been rendered if the fraud practiced upon him prevented him from presenting all his case to the court, but that a judgment will not be set aside on perjured testimony or for any matter that was presented and considered in the judgment assailed. The decisions, it is said, established this doctrine: "The acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds extrinsic or collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered." It is undoubtedly true, said Freeman, that the authority of this case is still unshaken. Section 1233. It has become a precedent for a large number of later decisions.

The parties to an action must be prepared to meet and expose perjury; they know that a false claim can be supported in no other way, and that the object of the trial is to ascertain the truth. In *Pico v. Cohn,* 13 L. R. A. (Cal.), 336, it was held that perjured testimony procured by bribery on the part of the successful party is not ground for setting aside a final decree, although it is reasonably certain that the result of a new trial would be different. After remarking that the trial is a party's opportunity for making the truth appear, the Court said: "If, unfortunately he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him, on motion for a new trial, and the judgment is affirmed on appeal, he is without remedy. The wrong, in such case, is, of course, a most grievous one, and no doubt the Legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischief far worse than the evil to be remedied. Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice; and so the rule is that a final judgment cannot be annulled merely because it can be shown to have been based on perjured testimony; for, if this could be done once, it could be done again and again, *ad infinitum.*"

Among the many other cases in which these principles are declared are *Greene v. Greene,* 2 Gray, 361, 61 A. D., 454; *Graves v. Graves,* 10 L. R. A. (N. S.) (Ia.), 216; *Nelson v. Meehan,* 12 L. R. A. (N. S.), 374, 155 Fed., 1; *Gray v. Barton,* 28 N. W. (Mich.), 95; *Reeves v. Reeves,* 25 L. R. A. (N. S.) (S. D.), 574; *Michael v. Am. Nat. Bank,* 95 N. E., (Ohio), 905; 38 L. R. A. (N. S.), 220; *Bates v. Hamilton,* 66 A. S. R. (Mo.), 407; *Wabash R. Co. v. Mirrieless,* 81 S. W. (Mo.), 437; *Fealey v. Fealey,* 43 A. S. R. (Cal.), 111.

Our own decisions have from the beginning been in accord with these principles. In *Gatlin v. Kilpatrick,* 4 N. C., 147, it was held that if a party's claims have been decided by a court of competent jurisdiction and he has had an opportunity of presenting them he shall no longer be at liberty, if unsuccessful, to harass his adversary; and the reason is clearly given in *Jones v. Jones, ibid.,* 547. Equity will not set aside even an "unconscientious verdict at law unless it were not competent to the complaining party to make his defense in a court of law." *Peace v. Nailing,* 16 N. C., 289.

The question under discussion was suggested in *Dyche v. Patton,* 43 N. C., 295; it was not decided because not presented by the case on appeal; but it was afterwards brought up in the same case and the Court held that a verdict obtained in a court of law by perjured testimony would not be set aside unless the witness on whose testimony the verdict was given had been convicted of perjury or a sufficient reason was given for failure to prosecute him. *Dyche v. Patton,* 56 N. C., 332. This was approved in *Moore v. Gulley,* 144 N. C., 81, *Justice Walker* remarking, "Numerous cases have been decided in this Court involving the question now presented to us, and we believe that in all of them the principle stated in *Tovy v. Young* has been followed, and a conviction of the alleged perjury required as a condition of granting equitable relief." The principle was stressed in *Mottu v. Davis,* 153 N. C., 160, in these words: "It has been held by many courts, and the text writers seem to adopt the principle as settled by the great weight of authority, that perjury, being intrinsic fraud, is not ground for equitable relief against a judgment resulting from it, but the fraud which warrants equity in interfering with such a solemn thing as a judgment must be such as is practiced in obtaining the judgment and which prevents the losing party from having an adversary trial of the issue." Of similar import are *Williamson v. Jerome,* 169 N. C., 215; *Kinsland v. Adams,* 172 N. C., 765.

The authorities we have cited reduce the entire controversy practically to the consideration of one question: Did the plaintiff offer such competent evidence of extrinsic fraud in procuring the judgment he assails as would justify a court of equity in vacating the judgment? That the complaint is sufficiently comprehensive has been adjudicated. *McCoy v. Justice,* 196 N. C., 553. Whether the evidence is adequate is quite another matter.

Does the evidence proposed by the plaintiff to establish fraud relate only to "the merits between the parties"—to the issues joined upon the pleadings, or does it relate to some matter which "prevented the plaintiff from presenting his defense"? Does the proposed evidence pertain to "matter that was presented and considered in the judgment assailed," or does it show that there was not "a real contest in the trial or hearing of the case"? Whether the alleged fraud was intrinsic or extrinsic depends upon the answer to these questions. If it was extrinsic, the judgment should be vacated; if intrinsic, pointing to false swearing, it should be vacated only when it appears that the witness has been convicted of perjury.

Let us turn now to consideration of the plaintiff's exceptions, thirty-four in number.

The plaintiff offered in evidence the whole record in the case of *Annie Hyatt v. W. L. McCoy,* 194 N. C., 25, including the complaint, demurrer, judgment, and opinion of the Supreme Court. The demurrer and the opinion were excluded, and the complaint was admitted as against Annie Hyatt only. The demurrer raised a question of law and the opinion of the Supreme Court was a judicial utterance; neither of them proved any fact. In our research we have not discovered anything in this complaint which tends to show that Annie Hyatt unlawfully conspired with her husband to prosecute his action against McCoy. But suppose it be granted that her complaint was not true: false allegations in a pleading ordinarily fall within the category of intrinsic fraud; as a rule they are not such fraud as warrants equitable relief, because "the truth or falsity of the matters alleged is conclusively determined by the judgment in the absence of some other ground for equitable interference." Freeman on Judgments (5th ed.), secs. 233 and 1237. As was said in *United States v. Beebe,* 180 U. S., 343, 45 Law Ed., 563: "The statements had no tendency to prevent full preparation for trial on the part of complainant, nor did they tend in any way to obstruct the full presentation of the cause of action against the defendants on the trial. It is plain, therefore, that the representations, assuming them to have been false, could not constitute such a fraud as upon well-settled principles a court of equity will relieve against by setting aside a judgment in a case where such representations were made."

This applies with equal force to the appellant's offer to introduce the record in *Perry Hyatt v. McCoy.* The judgment was admitted by the parties; and several allegations in Hyatt's complaint had been introduced previously, without objection by the defendants. The first and second exceptions, therefore, are without any substantial merit.

The plaintiff offered in evidence (1) a part of the thirteenth paragraph of his complaint in the present action setting forth the institution of a proceeding by Annie Hyatt against the administrator of Perry Hyatt, to recover a distributive share of her husband's personal estate, and, in her reply to the answer filed, certain allegations to the effect that at no time did she abandon her husband, or refuse to live with him or elope with McCoy, or that her absence from home at the death of her husband was due to her alleged misconduct, and that her husband provided for her support and maintenance until his death; (2) an admission by Annie Hyatt and the administrator and some other defendants that she had brought the proceedings; (3) the complaint in the case of Annie Hyatt against the administrator; (4) a paragraph in the reply of Annie Hyatt in which she denied having improper relations with McCoy on the occasions and at the places described in the answer.

It appears from the record that this evidence was offered to prove that a material part of Annie Hyatt's testimony in her husband's case was untrue. To sustain the proffered evidence the appellant rests his argument on the familiar principle that statements in pleadings are admissible against the party making them and that inconsistent or contradictory statements, made by a person orally or in writing, may generally be proved against him. The doctrine is generally approved in text books and judicial opinions, and we have no disposition to challenge its soundness. *Sawyer v. R. R.,* 145 N. C., 24; *Ledford v. Power Co.,* 194 N. C., 98, 102. But in this instance it is not available to the appellant. In the first place a careful comparison of the testimony of

Annie Hyatt in the suit brought by her husband with her replication in her suit against Justice as administrator, raises grave doubt whether her various statements are essentially inconsistent on the vital points of the controversy; but if in any view they can be so considered her alleged contradictions are nothing more than proof of false swearing in behalf of her husband; and this, as we have seen, is intrinsic fraud, which is not enough to require that the judgment be annulled. For these reasons exceptions 3-9, inclusive, must be overruled.

Exceptions 10-19 are addressed to the exclusion of certain parts of the deposition of Y. V. Dudley. This witness testified that he had been in the employ of McCoy; that he had frequently visited Perry Hyatt, and that he knew when Hyatt brought his suit against McCoy. The appellant then offered in evidence statements in the deposition to the effect that Hyatt had told the witness that for his own injuries he had settled with McCoy for $2,000, and that he had in mind a scheme by which "if it worked out, they could get more money out of McCoy"; that at a later date he explained his scheme as an agreement between him and his wife that she should leave home and stay away until he had won his case against McCoy; that they had separated under this agreement; and that she would return after the case was won. This part of the deposition was excluded. It was offered against Annie Hyatt and the personal representative of her husband as evidence tending to show the furtherance of a common design. There is no doubt of the general proposition that the declarations of one of the parties to an unlawful conspiracy, relating to the combination, are evidence against the others, though made in their absence, provided the parties were at the time of the declarations engaged in the consummation of the common purpose. *Edwards v. Finance Co.,* 196 N. C., 462. But when we undertake to apply this principle in an action instituted to set aside a judgment rendered by a court of competent jurisdiction we are confronted with the primary question whether the alleged conspiracy, if proved, is anything more than an agreement to give perjured testimony in Perry Hyatt's action against McCoy. On this question *Rollins v. Henry,* 84 N. C., 569, cited by the plaintiff is not in point; there a decree was entered by consent of the litigants in fraud of the rights of other parties. If Hyatt and his wife conspired to give false testimony concerning their separation, their offense was an agreement to commit perjury; they committed perjury if they gave false testimony on oath. But as to this the fraud they perpetrated, if any, was fraud in the cause itself and not in the procurement of the judgment, and did not deprive McCoy of any defense he had. If there was a fictitious separation the situation was to be met as in any other case of perjury. "It has been well said that every litigant enters upon the trial of a cause knowing not merely the uncertainty of human testimony when honestly given, but that, if he has an unscrupulous antagonist, he may have to encounter fraud of this character and that he must take the chances of establishing his case by opposing testimony, and by subjecting his opposing witnesses to the scrutiny of a searching cross-examination. Hence, the case is none the less tried on its merits, and the judgment rendered is none the less conclusive by reason of the false testimony produced" (15 R. C. L., 770, sec. 222); and the limitation on this rule will not be modified by the discovery after the trial of additional evidence in proof of the fraud. In *Thompson v. Thompson,* 26 L. R. A. (N. S.) (Ga.), 536, it is aptly said: "To set aside a verdict and judgment for fraud, where the particular fraud was in issue, because of the discovery of additional evidence to prove it, would deprive a judicial finality—a judgment—of its inherent and distinguishing characteristic. The same reason for annulling a judgment because of the discovery of new evidence to establish the fraud would apply to the unfortunate litigant who had been unjustly charged with fraud, so as to give him another opportunity to raise anew the issue of fraud on newly discovered evidence of his innocence."

In any event the excluded testimony was harmless because the substance of it was brought out on Dudley's cross-examination. These exceptions disclose no adequate cause for a new trial.

The next group (exceptions 20-23) related to asserted error in the exclusion of certain papers claimed to be letters written by Hyatt to his wife and from her to him, in reference to their separation. One of them, purporting to have been written by him, is dated 20 July, 1926; three, purporting to have been written by his wife, are dated 23 July, 1926, 24 December, 1926, and 21 January, 1927. Hyatt's case against McCoy was tried in November, 1926.

The letters were properly excluded under the principles hereinbefore discussed and for the additional reason that they were privileged communications. In what way did the plaintiff get possession of them? He testified: "I heard a conversation between Hal Zachary and Dean Sisk and Annie Hyatt in Sisk's office. She said, 'I brought the letters between Perry Hyatt and myself.' I was not in the office, but I heard the conversation. I was in Dr. Williams's office. Probably half hour after that Hal Zachary brought these letters in my office and said these are the letters Mrs. Hyatt had. (Record, 109.) . . . . Mr. Hal Zachary handed me this letter in the office one day. I don't know how he got it except what Mrs. Hyatt told me later, that it was a letter she received from her husband and she gave it to Hal. I had the letter in my hand then. I think she told me to keep it for awhile and I was to return it later, but I never did." (Record, 108.)

That the letters were confidential communications is not questioned. "No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage." C. S., 1801. The reason of the rule is grounded in public policy, which seeks to preserve the peace, confidence, and tranquility of husband and wife. *Whitford v. Ins. Co.,* 163 N. C., 223. In *S. v. Wallace,* 162 N. C., 623, it was held that a third person may testify to an oral communication between husband and wife although his presence was not known; also that written communications would be admissible if procured by a third party without the consent or privity of the husband or the wife. This conclusion in effect adopts the principle stated by *Mr. Justice Miller,* of the Supreme Court of the United States in *Bowman v. Patrick,* 32 Fed., 368: "We think the policy of the law will be best subserved by refusing to admit written communications of this character, whenever they come within the possession of a third party by the agency of the husband or wife. . . . I am quite clear that the wife has no right to publish those communications; that she would not be permitted to produce the letter if she were a witness on the stand; and that, she should be enjoined from producing the letter if she were supposed to be hostile to her husband." Numerous decisions in support are cited in the annotations of *Gross v. State,* 33 L. R. A. (N. S.), 481. It is too clear for doubt that the plaintiff procured these letters with the consent, if not the privity, of Annie Hyatt.

The letters are not admissible against her individually. It is so held in *S. v. Brittain,* 117 N. C., 783: "As a general rule evidence competent against one defendant only is admissible, with instruction by the court that it shall not be received as evidence against the other. To this general rule the confession in this case is an exception, and is so on the ground of public policy. The relation of husband and wife is confidential, from unity of interest and sometimes unity of person, as in case of a joint estate to them. The law requires and extorts this confidence, and it will protect it. Communications between them cannot be exposed to public view. The interest of the home, the parties, the children, and especially the peace and order of society forbid it. Lord Coke said: 'It hath been resolved by the justices that a wife cannot be produced either against or for her husband *quia sunt duae animae in corne una;* and it might be a cause of implacable discord and dissension between the husband and wife and a means of great inconvenience.' Co. Litt., 6 b. It is true that the confession under consideration does not affect the husband in a legal sense, but it does affect her, and it violates the principle of public policy above referred to."

The remaining exceptions are void of merit. The twenty-fourth and twenty-fifth have been disposed of; the proposed testimony which is the subject of the twenty-sixth is hearsay; it does not appear that Annie Hyatt heard any of the conversations she refers to, or that any of the parties were present when she made her statements to McCoy, or that she had personal knowledge of any of the transactions. Her entire testimony is a series of narratives in hearsay, in the exclusion of which the court committed no error. The twenty-seventh, twenty-eighth and twenty-ninth relate to incompetent evidence. The affidavit of Annie Hyatt, signed 7 March, 1928, was offered for the purpose of proving the alleged conspiracy between her and her deceased husband and that her testimony given in her husband's action against McCoy was false. Exception 30: The incompetency of this evidence is manifest upon the principles above set forth. The last four exceptions are untenable and require no discussion.

We have given the record deliberate and careful consideration. The essence of the plaintiff's case, however diverse its several elements, is crystallized in an effort to set aside the judgment upon the ground of false testimony. If the judgment were vacated for this cause and the plaintiff were again the unsuccessful party why could he not assail the second judgment upon similar allegations? It is for the public good that there be an end to litigation. This maxim "embraces the whole doctrine of estoppels, which is obviously founded in common sense and sound policy, since, if facts once solemnly affirmed to be true were to be again denied whenever the affirmant saw his opportunity, there would never be an end to litigation and confusion." Brown's Legal Maxims, 337. Judgment

Affirmed.

N. S. WOLFE, ADMINISTRATOR OF E. R. WOLFE, DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 22 October, 1930.)

1. **Master and Servant E a—Where it is admitted that deceased was engaged in interstate commerce the Federal Act and decisions apply.**

Where in an action in the State court against a railroad it is admitted that the plaintiff's intestate was engaged in interstate commerce at the time of his fatal injury, the liability of the defendant will be determined by the Federal Employers' Liability Act as construed and applied by the courts of the United States.

2. **Master and Servant E b—In this case held: Evidence disclosed no negligence on part of defendant and nonsuit was proper.**

Where in an action under the Federal Employers' Liability Act the evidence discloses that the plaintiff's intestate was an experienced switchman, and was applying brakes to cars which had been shunted by the defendant's shifting engine, and that before the cars upon which he was riding had been stopped they were hit by other cars shunted on the same track for the purpose of making up a train, and that the force of the impact knocked the plaintiff's intestate off the cars and killed him, with further evidence disclosing without contradiction that the shifting was done in the usual way according to the customary method, and there is no evidence of any unusual jerking or unexpected movement of cars, or that defendant's employees knew or had reason to believe that plaintiff's intestate was oblivious to the usual hazards is *held:* insufficient to take the case to the jury, and judgment as of nonsuit was properly entered.

CLARKSON, J., dissenting.

CIVIL ACTION, before *Moore, Special Judge,* at April Term, 1930, of EDGECOMBE.

The evidence tended to show that the deceased, E. R. Wolfe, was an experienced switchman for the defendant, having entered the switching service in 1917. On or about 6 December, 1924, the defendant was switching cars for the purpose of making up a freight train on its yards in South Rocky Mount. The defendant's shifting engine had shunted or kicked a string of two or three cars on one of the tracks, and the deceased was on the rear end of these cars putting on brakes. Before these cars were stopped the defendant shunted or kicked another string of cars upon the same track. The second string of cars so kicked in struck the first string upon which plaintiff's intestate was riding, knocking him off and killing him.

The only witness who saw the occurrence was a negro preacher named July. His narrative is substantially as follows: "I saw the accident. I saw, possibly, it was two or three cars, I disremember which, but Mr. Wolfe was on the rear end of the cars. The engine had shifted these cars on one of the tracks. . . . When the engine shifted them in it left the cars running, and the engine cut loose. Mr. Wolfe was up there putting on brakes, whensoever they shunt the cars in. When I last saw him other cars came in and struck the cars he was on before he got them finally stopped. The engine shoved these cars in or kicked them in, but the engine was cut loose from them before they stopped rolling. The last cars struck the one on which Mr. Wolfe was on and knocked him off. . . . Mr. Wolfe was on the cars that were first put in with his brake stick turning the brake wheel when the second cars were run on him. I did not hear any notice given to him of their approach. . . . If the engineer and conductor on the shifting train had been looking, there was nothing to keep them from seeing Mr. Wolfe. . . . The string of cars upon which Mr. Wolfe was trying to stop were still rolling when the second string of cars was kicked in upon the track. He had checked the speed of the first cars, but they had not fully stopped. That is done on the yards every day. That is the way they make up a train. There was nothing unusual in what happened except that he fell off. That happens every day. The cars that were rolled into that track were to be coupled unto the cars he was on. They were part of the same train, made up in the same train, and put in there for the purpose of making up the train. When they came in behind the cars he was on they rolled up there and struck the car he was on. That happens dozens of times in making up trains. It is a common everyday thing. Nothing unusual about it. It happens that way usually down there."

The record contains this entry: "It was admitted by both sides that plaintiff's intestate was engaged in interstate commerce and was under the provisions of the Federal Employers' Liability Act."

At the conclusion of plaintiff's evidence the defendant moved for judgment of nonsuit, which motion was allowed by the court.

From the judgment so rendered the plaintiff appealed.

R. T. Fountain, Thomas J. Pearsall and George M. Fountain for plaintiff.

Spruill & Spruill for defendant.

Brogden, J. It having been admitted that plaintiff's intestate was engaged in interstate commerce at the time of his death, it necessarily follows that the liability of the defendant must be determined solely by the Federal Employers' Liability Act as construed and applied by the courts of the United States. The rules of liability declared by the Federal Courts of last resort, relating to injury sustained by brakemen and others while at work around and upon shifting trains and shunted cars, are discussed and applied in many cases, notably: *C. & M. and S. T. P. Ry. v. Coogan,* 271 U. S., 472; *Gulf, Mobile and Northern R. R. Co. v. Wells,* 275 U. S., 455; *Toledo, St. Louis & Western R. Co. v. Allen,* 276 U. S., 165; *Delaware L. & W. R. Co. v. Koske,* 279 U. S., 7; *Chesapeake & Ohio R. R. Co. v. Mihas,* 50 Supreme Court Reporter, 42; *Slocum v. Erie R. R. Co.,* 37 Fed. (2d), 42.

In the *Toledo case, supra,* a car checker was injured by a shunted car. In discussing the merits of the question the Supreme Court of the United States said: "The work of checking cars in a yard at night where switching is being done is necessarily attended by much danger. But fault or negligence may not be inferred from the mere existence of danger or from the fact that plaintiff was struck and injured by the moving car. . . . On the evidence it must be held that he knew how switching was done there; and, in the absence of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning. . . . There is nothing to sustain a finding that plaintiff was in any danger other than such as was usually incident to his employment or that any member of the crew knew or had any reason to believe that he was oblivious of the situation. In the absence of knowledge on their part that he was in a place where he was liable to be struck and oblivious of that danger, they were not required to vary the switching practice customarily followed in that yard or to warn or to take other steps to protect him."

In the *Mihas case, supra,* the plaintiff was employed to care for switch lights and lamps along the right of way. In the line of his duty he attempted to climb over a coal car standing on a switch track. While doing so, a string of nine cars was forcibly propelled by means of a flying switch against the standing cars with such force that the plaintiff was knocked off and severely injured. The Court said: "There is nothing in the record to show that employees engaged in the switching operation knew or had reason to believe that Mihas was in any position of danger. In the absence of such knowledge or ground for belief they were not required to warn him of the impending switching operation or to take other steps to protect him."

The plaintiff in the *Slocum case, supra,* was a switchman and was knocked off a car during a switching operation and killed. Recovery was permitted in the State court upon the theory that he was knocked off by the impact of shunted cars. The Circuit Court of Appeals for the Second Circuit, in denying the right of plaintiff to recover, declared: "There must be proof of some unusual jar, and this was altogether lacking in the present case."

Applying the principles of law to the facts, it is manifest that the switching operation involved in the case at bar was done in the usual and customary manner and according to the usual practice established in the yards of defendant at Rocky Mount. The plaintiff's intestate, as a switchman of twelve years experience, must have been thoroughly cognizant of the usual and customary practice in such operations and aware of all the usual hazards incident to his employment. The evidence discloses, without contradiction, that the switching was done in the usual way, according to the customary method, and that there was no departure from the usual practice in making up the train. Moreover, there was no evidence of any unusual jerking or unexpected movement of cars, nor is there evidence that the employees of defendant knew or had reason to believe that plaintiff's intestate was oblivious to the hazards and dangers which surrounded him.

Under such circumstances the Federal Law denies recovery, and the judgment of nonsuit was properly entered.

Affirmed.

CLARKSON, J., dissenting: Taking the entire evidence of J. A. July, witness for plaintiff, I think it was sufficient to be submitted to the jury.

In *Shell v. Roseman,* 155 N. C., at p. 94, we find: "We are not inadvertent to the fact that the plaintiff made a statement on cross-examination as to a material matter, apparently in conflict with his evidence when examined in chief, but this affected his credibility only, and did not justify withdrawing his evidence from the jury. *Ward v. Mfg. Co.*. 123 N. C., 252."

E. R. Wolfe was a switchman, working for defendant. July testified, in part: "It was a shifting engine shifting cars on these spur tracks that I have just described. I remember the day Mr. E. R. Wolfe was killed and run over. I saw the accident. I saw possibly it was two or three cars, I disremember which, but Mr. Wolfe was on the rear end of the cars. The engine had shifted these cars on one of the tracks, like track 10, as well as I can remember. When the engine shifted them in it left the cars running, the engine cut loose. Mr. Wolfe was up there putting on brakes, whensoever they shunt the cars in. When I last seen him there come in other cars and struck the cars he was on before he got these finally stopped. The engine shoved these cars in, what I call kicked in, but the engine was cut loose from them before they stopped rolling. These last cars struck the one on which Mr. Wolfe was on and knocked him off. . . . When Mr. Wolfe was on the cars that were first put in with his brake stick turning the brake wheel, when the second cars were run in on him I didn't hear no notice given to him of their approach. The cars passed by me where I worked. They passed by where I was. . . . Q. Was there anything, if the engineer and conductor on the shifting train had been looking, was there anything to keep them from seeing Mr. Wolfe? A. Nothing as I know of. I don't have any opinion as to the rate of speed the first cars were going when they were shunted in there. They were going good and swift. The second lot of cars come in about the same speed. The engine left these first ones going there. . . . Three or four minutes the cars had been rolling away from the ladder before the other cars came in there and struck against it, but I couldn't say definitely how many minutes it was. I couldn't give you exactly the speed of them, but rolling pretty good and swift. When the engine kicked them in there I suppose they might have been going eight or ten miles an hour. Passed me rolling about that speed. The first ones had slowed down some. When they passed me they were not going eight or ten miles an hour. The last ones were kicked in there. When they were first kicked in there they were making about that speed. I said up on the end, just about where the engine cut loose from them they were going eight or ten miles an hour. . . . I stated that when the first cars were shunted in they were shunted in about ten miles an hour and gradually slowed down. The brakeman, Mr. Wolfe, slowed these cars down. When the second group of cars came in no brakeman or switchman was on the cars. The speed on them had not slackened before it struck the car Mr. Wolfe was on."

E. R. Wolfe's wife testified: "At the time of his death his salary was around two hundred dollars a month. He was an economical man and provided well for his family. At his death he didn't leave any estate but a home, and it was not paid for."

Here we have a man, without any fault on his part, killed at his post of duty, leaving a wife and family practically penniless. The evidence shows that Wolfe was on the rear end of the cars, which had been shunted or kicked into a spur track, with the engine cut loose, putting on brakes to stop the shunted or kicked cars, with his brake stick turning the brake wheel. Before these cars were stopped, the engineer, without notice to Wolfe or any warning to him, kicked or shunted other cars on the same track "rolling pretty good and swift." The first cars shunted in had slowed down when Wolfe was putting on the brakes. The cars that were then kicked on the same track had no brakeman and the speed had not slackened before they struck the car Wolfe was on, nor was warning given by the engineer by ringing a bell or blowing a whistle. The impact was so severe that Wolfe was knocked from his post of duty and killed. "His body was badly cut up." A reasonable inference from the fact that Wolfe was knocked off by the impact, is that the jar was unusual and further that he had no notice. When the engineer kicked in the second lot of cars, which were going "good and swift," how easily the engineer could have given warning to Wolfe, by ringing the bell or blowing the whistle. Wolfe was suddenly, without notice, hurled to the ground and killed.

I think this action is governed by the principle set forth in *Chicago R. I. & P. R. Co. v. Ward,* 252 U. S., 18, 64 Law Ed., 431: "Applying the principles settled by these decisions to the facts of this case, the testimony shows that Ward had neither warning nor opportunity to judge of the danger to which he was exposed by the failure of the engine foreman to cut off the cars. In the absence of notice to the contrary, and the record shows none, Ward had the right to act upon the belief that the usual method would be followed and the cars cut off at the proper time by the engine foreman, so that he might safely proceed to perform his duty as a switchman by setting the brake to check the cars which should have been detached. *For the lack of proper care on the part of the representative of the railway company while Ward was in the performance of his duty, he was suddenly precipitated from the front end of the car by the abrupt checking resulting from the failure to make the disconnection.* This situation did not make the doctrine of assumed risk a defense to an action for damages because of the negligent manner of operation which resulted in Ward's injury, and the part of the charge complained of, though inaccurate, could have worked no harm to the petitioners. *It was a sudden emergency, brought about by the negligent operation of that particular cut of cars,* and not a condition of danger, resulting from the master's or his representatives' negligence, so obvious that an ordinarily prudent person in the situation in which Ward was placed, had opportunity to know and appreciate it, and thereby assume the risk." (Italics mine.)

The fact that the witness, July, testified on cross-examination, "That is the way they make up a train. There was nothing unusual in what happened except that he fell off," etc. Such statement did not negative the statement theretofore made in regard to this particular occurrence. The entire evidence was for the jury.

It will be noted that this is not a railroad yard case, as are the cases cited in the main opinion. See *Candler v. R. R.,* 197 N. C., 399. The *Slocum case* seems to be predicated mainly on the following in the opinion: "In the first place, all the testimony indicates that Slocum fell from the car on which he was riding, through some unknown cause, long before the engineer closed the throttle and put in the slack. Therefore, even if Delaney had stayed on duty and had uncoupled the engine, and if the fireman had remained in the cab so as to give Slocum a slacking signal, the accident would not have been avoided. Whatever may have been the cause of Slocum's death, it was not the neglect to give a slacking signal, because he evidently fell before any vibration from putting in the slack could have occurred."

The most recent case—a yard case—is *Atchison T. & S. F. Ry. Co. v. Toops,* 50 Sup. Ct. Rep., p. 281, decided 14 April, 1930. In that case there were no eye witnesses to the accident. Decedent was a conductor in charge of the railroad freight train. Under the rules of the railroad, the conductor was required personally to make the switching movement. At p. 283, it is said: "What actually took place can only be surmised. Whether he was run down on the track by the first car, or he attempted unsuccessfully to board the train on one side or the other or succeeded, and in either case finally came to his death by falling under or between the moving cars is a matter of guesswork."

The positive evidence in this case is that the shunted or kicked cars that struck the car where plaintiff's intestate was putting on brakes, knocked him off. It is not contended by defendant that E. R. Wolfe was negligent or in fault. He was on the top of the car with his brake stick turning the brake wheel, in the performance of duty, to stop the cars; without warning the impact of the shunted or kicked cars was so unusual and severe a "jar or jolt" that he was thrown to the ground and killed.

The plea of defendant is assumption of risk. The burden of this issue is on defendant. The fact was for the jury to determine and not this Court.

This is a hard case. Here one, admittedly in the performance of duty, a bread-winner, at his post of duty, is thrown from his place of work by shunted or kicked cars, without warning, no bell rung, whistle blown or brakeman on the shunted or kicked cars to give warning, the impact so severe as to hurl him from his place of safety to death. This faithful servant, without fault on his part, leaves a wife and family penniless. It is for the jury to say if he assumed such a risk as that which took his life. I think the evidence sufficient to be submitted to a jury.

FIRST NATIONAL BANK OF HENDERSON, IN BEHALF OF ITSELF AND ALL OTHER CREDITORS OF S. M. BLACKNALL, WHO MAY BECOME PARTIES AND JOIN IN THIS ACTION, AND CONTRIBUTE TO THE EXPENSE THEREOF, v., J. P. ZOLLICOFFER, TRUSTEE, MRS. GLADYS PEGRAM AND CHARLES H. BLACKNALL.

(Filed 22 October, 1930.)

Executors and Administrators D g—Where sole devisee mortgages lands devised, mortgagee may foreclose subject to rights of creditors.

Where the sole devisee of a testator qualifies as administratrix of the estate and, before the expiration of the two years for settlement of the estate, executes a deed of trust on the land devised to secure notes alleged to have been given to procure the withdrawal of caveat proceedings, the deed of trust is not absolutely void, C. S., 76, but is good as between the parties for what interest the devisee has in the land, and the *cestui que* trust has the legal right to have the trust deed foreclosed according to its terms, subject to the right of the creditors of the estate to have the title divested if the estate is insolvent, and the creditors may not enjoin the foreclosure proceedings upon equitable grounds.

APPEAL by Charles H. Blacknall, from *Devin, J.*, at June Term, 1930, of VANCE. Reversed.

Plaintiffs are creditors of the estate of S. M. Blacknall, who died in April, 1929. He was the owner of a nursery, known as the "Continental Plant Company," of Kittrell, N. C. He left the following will:

Kittrell, N. C., 29 March, 1929.

"I, S. M. Blacknall, being of sound and undivided mind, do hereby give and bequeath to my good friend, Mildred W. Purvis, all worldly and earthly goods which I possess or may become possessed.

"S. M. BLACKNALL.

"Witness: A. P. NEWCOMB,
STELLA H. CULPEPPER."

This will was duly probated in Vance County. Mildred W. Purvis qualified as administratrix of the estate of S. M. Blacknall, with the will annexed, before the clerk of the Superior Court of Vance County, on 23 April, 1929.

S. M. Blacknall was indebted to plaintiff bank and others. The inventory of the administratrix showed assets, real and personal property valued at $201,098.94, less bad accounts $4,292.81, making a total of $196,806.13; liabilities, notes, mortgages and interest $100,818.60, bills payable $23,536.20, total $124,345.20.

A caveat to the will of S. M. Blacknall was filed by his sister, Gladys Pegram, and Charles H. Blacknall, a nephew, the child of a deceased brother.

Among the numerous allegations made by plaintiffs were: "In order to effect the withdrawal of this caveat, the administratrix paid to Gladys Pegram and Charles H. Blacknall, out of the funds of the estate of S. M. Blacknall, the sum of $10,000 in cash, and executed a deed of trust as the sole devisee under the will, to J. P. Zollicoffer, trustee, in sixteen parcels of land in and around Kittrell, in which the said trust for the most part, by reference to the deeds from vendors to the late S. M. Blacknall, attempting to secure the payment of $10,000. Said deed appears of record in Book 155, page 58 of Vance County. . . . The plaintiff is informed, believes and alleges that the payment of $10,000 to the defendants, Gladys Pegram and Charles H. Blacknall, referred to in paragraph 8 of this complaint, was unlawful and a grievous wrong to the creditors of the late S. M. Blacknall, who are unpaid, and that the parties receiving the same should be required in law, equity and good conscience to return the same to the administratrix for their benefit."

The defendant, J. P. Zollicoffer, trustee for Gladys Pegram and Charles H. Blacknall, on account of default in paying of the $10,000 on the part of Mildred W. Purvis, advertised the sixteen parcels of land to be sold at public auction at 12 o'clock noon, on Monday, 16 June, 1930, in accordance with the terms of the deed of trust. In the notice of sale was the following: "This property is sometimes known as the Continental Plant Company, of Kittrell, N. C., and is sold subject to the debts of Shields M. Blacknall, whether the same be recorded in the register of deeds' office or evidenced by the books of the Continental Plant Company, or otherwise, but only the debts of Shields M. Blacknall. It is further well understood that this sale is intended to include any right, title, or interest which the said Mildred W. Purvis may have in and to the aforesaid real estate and the purchaser, will not be required to assume said debts."

The plaintiffs' prayer for relief is as follows: "Wherefore, the plaintiffs pray judgment: (1) That the defendants, Mrs. Gladys Pegram and

Charles H. Blacknall, be required to return to the administratrix of the estate of S. M. Blacknall the sum of $10,000 paid them in cash and to answer under oath with respect to any property real, personal or mixed in which either of them have invested any part of the sum received from the administratrix of the estate of S. M. Blacknall, and that the said defendants be held in contempt of this court until the money so unlawfully received be returned. (2) That the defendants be restrained from selling or offering to sell the real estate described in the said deed of trust until plaintiff's debt is paid. (3) For such other and further relief."

On application of plaintiffs, Judge W. A. Devin, on 6 June, 1930, issued a temporary restraining order, and on 24 June, 1930, the restraining order was continued to the hearing, and the judgment in part is as follows: "It is therefore ordered and adjudged that the restraining order heretofore granted in the cause be continued in force and effect in said order contained until a further hearing at the October, 1930, Term of Vance Superior Court, at such hour as shall be fixed by the judge for the hearing or upon a trial on the merits, with the right to all other creditors to make themselves parties and make such motions as they deem wise and in order that the subject-matter may be handled wisely with justice to all."

Mildred W. Purvis was not a party to the action. Gladys Pegram did not appeal from the judgment. Charles H. Blacknall alone appealed and assigned as errors:

"1. That the court erred in continuing the order restraining the sale of J. P. Zollicoffer, trustee, until the hearing, said order being in derogation of the rights of this defendant as a holder of notes secured in said deed of trust to an exercising by the trustee of the power of sale conferred in the deed of trust, the sale being preferred to be made in full subordination to and subject to all the rights of the plaintiff and other creditors of S. M. Blacknall, deceased.

2. That the court erred in holding that it would jeopardize the interest of the creditors of S. M. Blacknall to have a sale at this time of the interest of the devisee in the estate before the creditors are paid. Said finding being without basis in fact or law, inasmuch as the plaintiff and other creditors would have the same rights against the purchaser at the purported sale they now have against the said devisee.

3. That the judgment rendered by the court is not supported or authorized by the facts found by the court for as it nowise appears in said finding wherein the interests of the creditors of the estate would suffer by reason of the sale of the interest of the devisee subject to the rights of the creditors."

Pittman, Bridgers & Hicks for plaintiffs.
Yarborough & Yarborough for Charles H. Blacknall.

CLARKSON, J. In *Leak v. Armfield,* 187 N. C., at p. 628, it is said: "The mortgage is not a 'scrap of paper.' It is a legal contract that the parties are bound by. The courts, under their equitable jurisdiction, where the amount is due and ascertained—no fraud or mistake, etc., alleged—have no power to impair the solemn instrument directly or indirectly by nullifying the plain provisions by restraining the sale to be made under the terms of the mortgage."

The plaintiffs are creditors of the estate of S. M. Blacknall, deceased. Mildred W. Purvis is administratrix of the estate with the will annexed. It is alleged that she took from the assets of the estate $10,000 and paid it to Gladys Pegram and Charles H. Blacknall, to pay her individual debt and then in her individual capacity made the $10,000 deed of trust on the sixteen tracts of land willed to her by S. M. Blacknall, but at the time the estate was heavily indebted and before the two years had expired to settle the estate, under the statute, C. S., 76. As to the charge that the $10,000 payment to Gladys Pegram and Charles H. Blacknall was taken from the estate of S. M. Blacknall by the administratrix, Mildred W. Purvis, if the estate is insolvent, and there is not sufficient assets to pay plaintiff's debts, it may be that plaintiffs can recover the amount from Gladys Pegram and Charles H. Blacknall.

In *Wood v. Bank, ante,* 373, citing numerous authorities, we find the following: "It is well settled that where one's property has been purloined by actionable fraud or covin, the law permits him to follow it and recover it from the wrongdoer, or from any one to whom it has been transferred otherwise than in good faith and for a valuable consideration, so long as it can be identified or traced; and the principle applies to money and choses in action as well as to specific property."

C. S., 76, is as follows: "All conveyances of real property of any decedent made by any devisee or heir at law, within two years from the grant of letters, shall be void as to the creditors, executors, administrators and collectors of such decedent; but such conveyances to bona fide purchasers for value and without notice, if made after two years from the grant of letters, shall be valid even as against creditors."

In construing the above statute this Court, in *Davis v. Perry,* 96 N. C., at p. 262-3, says: "The statute (The Code, sec. 1442) (C. S., 76), provides that a deed thus made, and indeed all like conveyances made by devisees and heirs at law, 'within two years from the grant of letters, shall be void as to creditors, executors, administrators, and collectors' of the deceased debtor. But this does not imply that such conveyances are absolutely void and inoperative at all events. The contrary appears from the terms, nature, and purpose of the statute. They are only void in any case as to creditors and personal representatives, and as to them, only in case the personal assets are insufficient to pay the debts and costs of administration; they are not void—they never cease to operate as to the parties to them; nor are they void or inoperative as to the bona fide purchasers for value, and without notice, if made after two years from the grant of letters—indeed, in that case, they are 'Valid even against creditors.' They are never primarily void *ab initio;* they become so only to the extent, and in the cases and contingencies prescribed by the statute; but when the voidness supervenes to the extent indicated, it must prevail per force of the statute; it relates back to the time when the deed or other conveyance first became operative. It seems to be that this is the obvious and necessary interpretation of the statute referred to above."

With the law as above stated, the deed of trust from Mildred W. Purvis to J. P. Zollicoffer, trustee for Gladys Pegram and Charles H. Blacknall, is good between the parties for what interest she has in the land, subject to be divested by the creditors of the estate, if the estate is insolvent. It may be for the best interest of all parties that the judgment of the court below be sustained, but the defendant, Charles H. Blacknall, demands his legal right that the interest that Mildred W. Purvis has in the land which she made a deed of trust to J. P. Zollicoffer, trustee, to secure her debt to him, be sold, and we must so hold. As often said, "Hard cases are the quicksands of the law." Charles H. Blacknall has a legal right which a court of equity, under the facts in this case, cannot interfere with. The judgment of the court below is

Reversed.

THE RALEIGH BANKING AND TRUST COMPANY v. C. V. YORK, H. A. UNDERWOOD AND WILLIS SMITH.

(Filed 22 October, 1930.)

1. **Bills and Notes D b—Liability of parties to note as against payee is determined by position of signature.**

   When a promissory note sued on has the signatures of two of the defendants on its face as joint makers and the other defendant's signature on the back as endorser, the statute makes them each liable to the payee C. S., 3044, 2977, and nothing else appearing, those signing as makers are primarily liable, with the right of contribution among themselves, while the endorser is secondarily liable.

2. Same—As between themselves, makers and endorsers may show different liability by parol.

As between themselves, those whose names appear upon a promissory note as makers and endorsers may show by parol agreement that their respective liability was different than that fixed by statute in the placing of their signatures upon the instrument in suit, and where the correctness of the note as to the placing of the signatures is admitted, the burden of proof is upon the defendant claiming it, to show by parol that his liability was different from that which the statute imports.

3. Same—Unless different liability is shown, endorser paying note may recover from makers.

One who places his name upon the back of a negotiable note without specifying therein that he is otherwise to be bound thereon, is secondarily liable to those whose names thereon appear as makers, and nothing else appearing, may recover from them upon payment of the note.

4. Bills and Notes H a—Burden of proof is on party asserting different liability than that evidenced by note.

Where the negotiable instrument sued on has the names of two of the defendants appearing as makers and the other as endorser, and the evidence is conflicting as to whether the one appearing thereon as endorser was in fact an endorser, or an accommodation endorser or primarily liable as a joint maker, he is prima facie liable as an endorser, but may, as between the parties, establish his liability as an accommodation endorser, with the burden of proof on him to show it, and the burden on the other defendants to show his liability was a primary one as joint maker, when they so contend, and an instruction which fails to correctly charge the jury as to these presumptions will be held reversible error as to the endorser, and a new trial will be granted him on his appeal.

APPEAL by defendant, Willis Smith, from *Daniels, J.*, at March Term, 1930, of WAKE. New trial.

This is an action on a note, which is in words and figures as follows:

"$3,000.00. RALEIGH, N. C., 17 December, 1926.

Thirty days after date, without grace, we promise to pay The Raleigh Banking and Trust Company or order, the sum of three thousand and no/100 dollars, negotiable and payable at said bank, with interest after maturity, if unpaid, at the rate of six per cent per annum, payable semiannually, for value received, being for money borrowed; and the subscribers and endorsers hereby agree to continue and remain bound for the payment of this note and all interest thereon, notwithstanding any extension of time granted to the principal, and notwithstanding any failure or omission to protest this note for nonpayment, or to give notice of nonpayment or dishonor or protest, or to make presentment or demand for payment, hereby expressly waiving any protest and any and all notice of any extension or of nonpayment or dishonor or protest in any form or any presentment or demand for payment, or any other notice whatsoever.

12693 C. V. YORK.
H. A. UNDERWOOD."

The note bears an endorsement as follows: "Willis Smith." This endorsement was on the note when it was delivered to the plaintiff. Interest has been paid on the note to 16 September, 1928, as appears from notation on the back thereof. No other payment has been made to plaintiff on account of said note. This action was begun on 14 August, 1929.

Defendants admit the execution of the note, and their liability to plaintiff for the amount due thereon.

Each of said defendants, however, denies that he is liable as maker or principal; each alleges that he is liable to plaintiff, and as between himself and his codefendants, only as an accommodation endorser. Evidence was offered at the trial by each defendant tending to sustain his allegation. There was evidence also tending to show that defendants are liable as appears on the note, and as alleged in the complaint, to wit, that defendants, C. V. York and H. A. Underwood are liable as makers, and the defendant, Willis Smith, as an accommodation endorser.

The issues submitted to the jury were answered as follows:

"1. Is the liability of the defendant, C. V. York, that of a maker, or that of an accommodation endorser? Answer: Maker.

2. Is the liability of the defendant, H. A. Underwood, that of a maker, or that of an accommodation endorser? Answer: Accommodation endorser.

3. Is the liability of the defendant, Willis Smith, that of a maker, or that of an accommodation endorser? Answer: Maker."

From judgment that plaintiff recover of the defendants, C. V. York, and Willis Smith, as principals, and H. A. Underwood, as endorser, the sum of $3,000, with interest thereon at the rate of six per cent per annum, from 16 September, 1928, until paid, together with the costs of the action, the defendant, Willis Smith, appealed to the Supreme Court.

William Bailey Jones for plaintiff.
R. L. McMillan for defendant, C. V. York.
Clyde A. Douglass for defendant, H. A. Underwood.
Murray Allen and W. T. Joyner for defendant, Willis Smith.

CONNOR, J. On the face of the note sued on in this action, the defendants, C. V. York and H. A. Underwood, each having admitted in his answer that he signed his name as appears thereon, are makers or principals, and are liable as such, both to the plaintiff, as holder of the note, and to their codefendant, Willis Smith, as endorser. In the language of the statute, both said defendants are "absolutely required to pay the note." C. S., 2977. Nothing else appearing, they are liable primarily to the plaintiff for the amount due on the note at the commencement of this action. Their liability is that of joint-makers, with the right, as between themselves, of contribution. *Roberson v. Spain,* 173 N. C., 23, 91 S. E., 361. There is nothing on the face of the note showing that either of said defendants is surety for the other. Even if it were otherwise, these defendants would be liable primarily to the plaintiff, and would be required absolutely to pay the amount due on the note. In *Rouse v. Wooten,* 140 N. C., 557, 53 S. E., 430, it is held that, under C. S., 2977, the liability of a surety on a note is primary, for that he is absolutely required by the terms of the instrument to pay the amount due thereon. Of course, as between the surety and his principal, the surety is not liable, and if he is required to pay the amount due on the note, or any part thereof, he is entitled to recover of his principal the amount paid by him. Payment by the principal, however, discharges the note and relieves the surety of all liability thereon.

On the face of the note the defendant, Willis Smith, is an endorser, and upon the admission in the pleadings that he signed his name on the back of the note, before its delivery to the plaintiff, he is liable only as an endorser. In *Perry v. Taylor,* 148 N. C., 362, 62 S. E., 423, it is held, in the language of the statute—C. S., 3044—that a person, not otherwise a party, placing his name in blank on the back of a negotiable instrument, before delivery, unless he clearly indicates by appropriate words his intention to be bound in some other capacity, is liable as an endorser; upon failure of the holder to give him notice of nonpayment at maturity, he is discharged. The liability of an endorser, nothing else appearing, is secondary, and upon payment by him of the amount due on the note, or any part thereof, he is entitled to recover the amount paid of all parties primarily liable. *Dillard v. Farmers Mercantile Co.,* 190 N. C., 225, 129 S. E., 598; *Gillam v. Walker,* 189 N. C., 189, 126 S. E., 424; *Barber v. Absher Co.,* 175 N. C., 602, 96 S. E., 43; *Meyers v. Battle,* 170 N. C., 168, 86 S. E., 1034; *Bank v. Wilson,* 168 N. C., 557, 84 S. E., 866; *Houser v. Fayssoux,* 168 N. C., 1, 83 S. E., 692. In the instant case, all the defendants, whether makers, sureties, or endorsers, have waived notice of nonpayment of the note at maturity; neither of the defendants relies upon failure of such notice, as a defense in this action.

The defendant, Willis Smith, admits his liability to plaintiff for the amount due on the note set out in the complaint, but contends that he is liable, both to the plaintiff and as between himself and his codefendants, only as an accommodation endorser, for the reason that said codefendants are primarily liable on the note, as appears on its face, while he is liable only secondarily.

The defendants, C. V. York and H. A. Underwood, contend that the defendant, Willis Smith, although his name appears on the note as that of an endorser, is, in fact, a maker, and as such primarily liable to the plaintiff. Each of these defendants further contend that he signed the note, not as a maker, as appears thereon, but as an accommodation endorser.

Evidence was offered at the trial in support of these conflicting contentions. This evidence was submitted to the jury as pertinent to the issues set out in the record.

The law applicable to these contentions is as follows:

"In the absence of any special agreement, the relation which the parties to a bill or note bear to each other, is to be determined by the instrument to which they are parties. Ordinarily, the signatures .of parties to negotiable instruments have a well-understood position on the paper. The payee is named in the body of the note, the makers sign it upon its face, below the body of the instrument, and the endorser or guarantor signs his or her name upon the back. But the extent of the obligations assumed in and by promissory notes ought to be determined between the parties contracting, as in other contracts, by the intention of the parties, rather than by the particular place where one of the parties has placed his signature. So an endorsement may be made on the face of an instrument with the same effect as if made on the back, if such is the expressed intent of the parties." 3 R. C. L., p. 1122.

There was evidence in the instant case tending to show that at the time each of the defendants placed his name on the note, as appears on its face, and before its delivery to the plaintiff, it was understood and agreed by and between all the parties to the note, that the defendants did not intend to become bound thereon as their signatures indicated, but otherwise, as each defendant now contends, both as to himself and as to his codefendants; there was evidence to the contrary. An examination of the entire charge of the learned judge who presided at the trial in the Superior Court, does not disclose that he failed to charge the jury, as contended by the appellant, that in order to vary the liability of the defendants on the note, as appears on its face, the jury must find that there was an agreement to that effect to which all the defendants were parties. This principle was applied in *Bank v. Burch,* 145 N. C., 316, 59 S. E., 71. In that case it was held that in the absence of an agreement, or at least of a mutual understanding, to the contrary, the liability of the defendants was fixed by the terms of the note, and that it was therefore error to hold the appellant, who had signed his name on the back of the note, as surety, liable as cosurety with a defendant who had signed as a maker. In *Lancaster v. Stanfield,* 191 N. C., 340, 132 S. E., 21, it is said:

"It is a general rule that the true relation subsisting between the several parties bound for the performance of a written obligation may be shown by parol. The surety on the face of a note, and an accommodation endorser may, as between themselves, be shown by parol to be cosureties by virtue of a verbal understanding to that effect; and so it may be shown that, as among themselves, plaintiffs and defendants are mutually liable as joint-makers or cosureties. Brandt Suretyship Guaranty, Vol. I (3d ed.), pp. 562-3; *Bank v. Burch,* 145 N. C., 316, 59 S. E., 71; *Sykes v. Everett,* 167 N. C., 600, 83 S. E., 585; *Gillam v. Walker,* 189 N. C., 189, 126 S. E., 424; *Dillard v. Mercantile Co.,* 190 N. C., 225, 129 S. E., 598." The jury was properly instructed in accordance with the principle applied in authoritative decisions of this Court.

The contention of the appellant that the instructions to the jury with respect to the burden of proof on the issues appearing in the record, were erroneous, or at least confusing, must be sustained.

The burden of proof on the first issue involving the liability of the defendant, C. V. York, was on said defendant. On the face of the note, he is liable as a maker, or principal. He contended that he is liable only as an accommodation endorser. The court correctly instructed the jury that they should answer this issue, "maker," unless they found by the greater weight of the evidence that said defendant signed the note as an accommodation endorser, and that upon so finding they should answer, "accommodation endorser."

The burden of proof on the second issue, involving the liability of the defendant, H. A. Underwood, was on said defendant. On the face of the note, he is liable as a maker or principal. He contended that he is liable only as an accommodation endorser. The court instructed the jury as follows: "If the evidence satisfies you by its greater weight that he (H. A. Underwood) signed as a maker, you will say 'maker'; and if he signed as endorser, you will write in answer to that issue, 'endorser.'" This was error. The burden was on the defendant, H. A. Underwood, to show, by the greater weight of the evidence that he signed the note as an accommodation endorser, as he contended, and not as maker, as shown on the face of the note.

The burden of proof on the third issue, involving the liability of the defendant, Willis Smith, was not on said defendant, but on the defendants, C. V. York and H. A. Underwood. They contended that the defendant, Willis Smith, is liable as a maker; he contended that, as appears on the face of the note, he is liable only as an endorser. The court instructed the jury as follows: "If the evidence satisfies you by its greater weight that he (Willis Smith) signed as maker, then you will answer this issue, 'maker'; but if you are satisfied by the greater weight of the evidence that he signed as endorser, your answer will be 'as endorser.'" This was error, or at least confusing. This instruction imposed, or the jury might well have understood it as imposing, the burden of proof on the third issue on the defendant, Willis Smith.

We fail to find in the charge any instruction to the jury with respect to the presumption of liability arising from the face of the note. In the absence of evidence to the contrary, the defendants, C. V. York and H. A. Underwood, are liable as makers, and the defendant, Willis Smith, is liable as an endorser. The burden of proof on each issue was on the defendants, who contended that said issue should be answered otherwise than shown by the note. In view of the facts and circumstances shown by all the evidence, we think that the defendant, Willis Smith, is entitled to a new trial of this action. See *Hunt v. Eure,* 189 N. C., 482, 127 S. E., 593. In that case, the principle stated in *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398, as follows, is approved:

"The party alleging a material fact, necessary to be proved, and which is denied, must establish it by a preponderance of the evidence, or by the greater weight of the evidence. Having alleged the truth of a matter in issue, he becomes the actor as to such matter, and necessarily has the burden of proving it. The party denying his allegations cannot have this burden at any time during the trial, for this would be to place the burden of the issue on both parties at the same time."

It should be noted that in this case there was no denial by the defendants, or by either of them of liability to the plaintiff. The controversy was among the defendants, and involved only their respective liability to each other.

New trial.

C. L. HARTON v. J. D. ROSS.

(Filed 22 October, 1930.)

Highways B i—Where evidence discloses that auto accident resulted from ice on bridge and not from defendant's negligence, nonsuit is proper.

Where in an action for damages resulting from an automobile collision the evidence tends to show that the accident resulted from ice on a highway bridge and not from any negligence of the defendant, defendant's motion as of nonsuit is properly allowed.

APPEAL by plaintiff from *Harris, J.,* at May Term, 1930, of ALAMANCE. Affirmed.

Coulter & Cooper for plaintiff.
D. Dolph Long for defendant.

PER CURIAM. This is an action to recover damages growing out of the collision of cars, alleged to have been negligently caused by the defendant. At the close of the plaintiff's evidence the action was dismissed as in case of nonsuit. The cars in which the parties were traveling collided on a concrete bridge coated with ice. The plaintiff was injured and his car was damaged; but the injury and damage seem to have resulted from the condition of the highway and not from actionable negligence on the part of the defendant.

Affirmed.

H. J. SCOGGINS ET AL., ADMINISTRATORS OF HENRY J. SCOGGINS, DECEASED, v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 22 October, 1930.)

Railroads D b—Evidence of contributory negligence of intestate in crossing defendant's tracks held insufficient to bar recovery as matter of law.

In an action for damages against a railroad company for the negligent killing of plaintiff's intestate, struck by defendant's train as he was endeavoring to cross defendant's tracks at a grade crossing in a city, evidence tending to show that the train approached without warning and that the intestate stopped, looked and listened before going on the track and was prevented from seeing the approaching train by a string of box cars on another of defendant's tracks, is sufficient to resist defendant's motion as of nonsuit upon the issue of contributory negligence.

APPEAL by defendants from *Johnson, Special Judge,* at June Term, 1930, of DURHAM. No error.

This is an action to recover damages for the wrongful death of plaintiffs' intestate, who was struck and killed by one of defendants' trains at a public crossing in the city of Durham.

The issues submitted to the jury, involving the negligence of the defendant, and the contributory negligence of the deceased, as the proximate cause of the death of plaintiffs' intestate, were answered in accordance with the contentions of plaintiffs.

From judgment that plaintiffs recover of the defendants the sum of $2,000, the damages assessed by the jury, the defendants appealed to the Supreme Court.

Long & Young for plaintiffs.
McLendon & Hedrick for defendants.

PER CURIAM. Defendants' contention on their appeal to this Court, that there was error in the refusal of the trial court to allow their motion for judgment as of nonsuit, for that all the evidence showed that plaintiffs' intestate, by his own negligence contributed to the injuries which resulted in his death, cannot be sustained.

This case is readily distinguishable from *Pope v. R. R.,* 195 N. C., 67, 141 S. E., 350, and cases cited in support of the reversal of the judgment in that case. There was evidence tending to show that plaintiffs' intestate, before entering upon the crossing and immediately before he was struck by defendants' train, stopped, looked and listened for an approaching train; and that his failure to see the train approaching on the main line was due to the negligence of the defendants, in parking on the pass track a solid line of box-cars which extended from the crossing a distance of nearly a mile in the direction from which the train was approaching the crossing. There was evidence tending to show that this train was running at a rate of speed in excess of that prescribed by an ordinance of the city of Durham, and that no warning by the ringing of a bell or otherwise was given of the approach of the train. There was evidence on behalf of the defendants tending to contradict the evidence for the plaintiffs. All the evidence, pertinent to the issue involving contributory negligence, was submitted to the jury under a charge to which there was no exception. It is conceded that there was evidence tending to show that the death of plaintiffs' intestate was caused by the negligence of the defendants, as alleged in the complaint.

There was no error in the ruling of the trial judge on defendants' motion for judgment as of nonsuit at the close of all the evidence. The judgment is affirmed.

No error.

MAGGIE GILMORE v. IMPERIAL LIFE INSURANCE COMPANY.

(Filed 29 October, 1930.)

Insurance E b—Provision in policy of life insurance that no benefits would be allowed in case of death from apoplexy within one year is valid.

A provision in a policy of life insurance that the insurer would not be liable except for the return of the premium paid in case the insured died from apoplexy within one year from the date of the issuance of the policy is valid and enforceable in the insurer's favor, C. S., 6460, not being applicable to the facts of this case. *Holbrook v. Ins. Co.,* 196 N. C., 333, cited and distinguished.

APPEAL by plaintiff from *Midyette, J.,* at April Term, 1930, of CUMBERLAND. Affirmed.

The following judgment was rendered by the court below: "This cause coming on to be heard, and being heard, and it appearing to the court by admissions of counsel for the plaintiff and defendant, respectively, that on 16 July, 1928, the defendant issued its life insurance policy contract on the life of Thomas Gilmore, husband of the plaintiff, and that the plaintiff was named as beneficiary by the name of Annie Gilmore, which is the same person as the plaintiff, Maggie Gilmore; and that within less than one year the insured, Thomas Gilmore, died of apoplexy, and that said policy contract contained, among other things, the following clause: 'No benefits will be allowed for death caused by consumption, pellagra, Bright's disease, apoplexy or organic heart disease within one year, or suicide until the policy has been in force for two years, liability of the company is limited to the return of the premiums on this policy.' That the amount of the premium paid on said policy was $6.80, which was returned to the beneficiary prior to the institution of this action. Upon the foregoing facts, which are admitted, and also found by the court, it is therefore considered, ordered and adjudged that the plaintiff is not entitled to recover anything of the defendant, and that the aforesaid stipulation in said policy is valid and binding provision of the said policy, and it is further ordered that the plaintiff be taxed with the costs."

A. M. Moore for plaintiff.
Jones Fuller and Bullard & Stringfield for defendant.

CLARKSON, J. The facts set forth in the judgment of the court below are controlling. The policy contract, in clear language, provides that if the insured dies of "apoplexy" within one year, the liability of the company is limited to the return of the premiums, which have been returned to the plaintiff, beneficiary, prior to the institution of this action. We will not discuss the fact that the plaintiff, beneficiary, has accepted the premiums and perhaps is estopped to bring this action, but will decide the main question as to the binding effect of the contract. We can see no reason why the contract, although one of insurance, is not binding like any other contract, when a reasonable time limit is fixed as in the present contract.

In *Spruill v. Northwestern Mutual Life Ins. Co.,* 120 N. C., 141, it is held: Where a life policy provides that if, within two years from the date thereof, "the said assured shall, whether sane or insane, die by his own hand, then this policy shall be null and void," the insurer is protected from all liability if, within the two years, suicide shall be committed by the assured, whether sane or insane.

We think the case of *Holbrook v. Insurance Co.,* 196 N. C., 333, distinguishable. The statute, C. S., 6460, is not applicable to the facts in this case.

In the present case, the contract of insurance in specific language excludes *apoplexy* as a risk until one year after the policy contract is in force. The judgment of the court below is

Affirmed.

STATE v. T. S. CORNETT AND TWAY CORNETT.

(Filed 29 October, 1930.)

1. **Criminal Law I g—Where instruction is ambiguous as to the quantum of proof necessary for conviction a new trial will be awarded.**

The burden is on the State in a criminal action to prove the defendant's guilt beyond a reasonable doubt, and where the trial court instructs the jury that if they find by the greater weight of the evidence that the defendant committed the offense charged, and found him guilty beyond a reasonable doubt, they should return a verdict of guilty, a new trial will be awarded on appeal, it being impossible to determine which of the conflicting instructions the jury followed.

2. **Indictment E c—Instruction that pasture is a field within the meaning of the statute making the removal of a fence therefrom misdemeanor is error.**

Where in a criminal prosecution for the violation of C. S., 4317, providing that a person removing a fence surrounding "any yard, garden, cultivated field, or pasture" should be guilty of a misdemeanor, the indictment charges the defendant with having removed a fence surrounding a cultivated field, and the evidence is that the fence surrounded a pasture: *Held,* the words "pasture" and "cultivated field" are not synonymous and are distinguished in the statute by a disjunctive, and an instruction which charges that a pasture is a cultivated field within the meaning of the statute is erroneous.

APPEAL by defendants from *Moore, J.,* at April Criminal Term, 1929, of ASHE. New trial. See *S. v. Cornett,* 197 N. C., 627.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

W. R. Bauguess for defendants.

ADAMS, J. If any person shall unlawfully and wilfully burn, destroy, pull down, injure, or remove any fence, wall, or other inclosure, or any part thereof, surrounding or about any yard, garden, cultivated field, or pasture, . . . he shall be guilty of a misdemeanor. C. S., 4317.

The indictment charges the defendant with pulling down, injuring, and removing a fence surrounding a cultivated field in breach of this statute. He was convicted, and from the judgment pronounced he appealed to this Court.

His Honor gave the jury this instruction: "I charge you that if you find from the evidence and by its greater weight that they moved the fence from the place where it was, or tore down the fence and put up some other fence, they would be guilty of moving a fence surrounding a cultivated field; a pasture field is a cultivated field in law, because a man could not have a pasture unless he cultivated it; and if you find by the greater weight of the evidence that they tore down this fence as described by the prosecuting witness and Tway Cornett; if you find that to be true beyond a reasonable doubt it will be your duty to return a verdict of guilty; and if nothing to the contrary you will return a verdict of guilty."

The defendants cannot be convicted unless their guilt is proved beyond a reasonable doubt; but under the instruction given it was permissible to establish their guilt by the greater weight of the evidence. Through an inadvertence the burden imposed upon the plaintiff in a civil action is that which was imposed upon the State in the first part of the charge. The subsequent imposition upon the State of the proper burden of proof did not cure the error. How can it be determined which of the conflicting instructions the jury adopted?

The indictment charges the removal of a fence surrounding a cultivated field. According to the evidence the fence surrounded a "pasture field," in which there was turf grass, but no crops. The statute forbids the injury, removal, or destruction of a fence surrounding . . . a cultivated field or pasture. If the words "cultivated field" and "pasture" are synonymous, why distinguish the terms by a disjunctive? If land is cleared, fenced, and cultivated, or is kept and used for cultivation according to the ordinary course of husbandry, although nothing is growing within the enclosure at the time of the trespass, it is a cultivated field within the meaning of the statute. *S. v. Allen,* 35 N. C., 36; *S. v. McMinn,* 81 N. C., 585; *S. v. Campbell,* 133 N. C., 640; *Combs v. Commissioners,* 170 N. C., 87. The word "pasture" is defined as ground for the grazing of domestic animals. New Standard Dictionary; 1 Thomas, Coke, Litt., 202. It includes also the grass growing upon the ground. *Gulf, etc., Ry. Co. v. Jones,* 21 S. W., 145; 47 C. J., 1376. But a pasture is not cleared ground under cultivation. *S. v. Perry,* 64 N. C., 305.

New trial.

STATE v. DEWEY MARTIN.

(Filed 29 October, 1930.)

Indictment E b—In this case held: there was a fatal variance between indictment and proof.

Where an indictment in a criminal prosecution charges the defendant with having fraudulently obtained goods by means of a worthless check in violation of C. S., 4283, and the defendant is convicted of having uttered a worthless check in violation of chapter 62, Public Laws of 1927, the offenses are not the same, and there is a fatal variance between the indictment and proof, and the defendant's demurrer to the evidence will be sustained in the Supreme Court on appeal. C. S., 4643.

APPEAL by defendant from *Schenck, J.*, at March Term, 1930, of FORSYTH.

Criminal prosecution tried upon a warrant charging the defendant with fraudulently obtaining goods by means of a worthless check in violation of C. S., 4283.

The defendant was convicted of uttering a worthless check, with knowledge of its worthlessness, in violation of chapter 62, Public Laws 1927.

From the judgment rendered, the defendant appeals, assigning as error the refusal of the court to dismiss the action as in case of nonsuit.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

E. M. Whitman for defendant.

STACY, C. J. The defendant was indicted under one statute and convicted under another. The two are not the same. There is a fatal variance between the indictment and the proof. *S. v. Corpening,* 191 N. C., 751, 133 S. E., 14. The Attorney-General confesses error. The demurrer to the evidence will be sustained here as provided by C. S., 4643.

Reversed.

STATE v. PERCY HAYESLIPPS AND ROBERT HARRIS.

(Filed 29 October, 1930.)

Criminal Law L a—Where appeal in capital case is not prosecuted according to Rules it will be dismissed, no error appearing on face of record.

Where the defendants convicted of a capital offense give notice of appeal, but nothing is done toward perfecting the same, the motion of the Attorney-General to docket and dismiss the appeal will be allowed, no error appearing upon the face of the record proper.

MOTION by State to docket and dismiss appeal.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

STACY, C. J. At the May Term, 1930, Forsyth Superior Court, the defendants herein, Percy Hayeslipps and Robert Harris, were tried upon an indictment charging them with a capital offense, to wit, rape, which resulted in a conviction of both the defendants, and sentences of death pronounced thereon. From the judgments thus entered, the defendants gave notice of appeal to the Supreme Court, but nothing has been done towards perfecting same.

As no error appears on the face of the record proper, the motion of the State must be allowed. *S. v. Brumfield,* 198 N. C., 613.

Appeal dismissed.

RAILWAY EXPRESS AGENCY, INC., v. A. J. MAXWELL, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 29 October, 1930.)

1. **Statutes A e—Statute will be presumed to be constitutional.**

   In passing upon the constitutionality of a statute every reasonable presumption in favor of its validity will be given by our courts.

2. **Taxation E c—Burden is on person seeking to recover tax to prove the invalidity of the statute levying it.**

   Where a taxpayer has paid a tax imposed by statute, following statutory procedure, and seeks to recover the amount so paid on the ground that the statute levying the tax is invalid, the burden is upon him to show the invalidity of the statute.

3. **Taxation A d—Minimum tax on express companies of $15.00 per mile of track operated over held constitutional and valid.**

   A tax upon express companies of $15.00 per mile of track over which they operate in this State, when the net income is six per cent or less, levied under the provisions of statute, is valid under the provisions of our State Constitution, Art. V, sec. 3, providing that the General Assembly may tax trades, professions, franchises and income.

4. **Same—Corporation doing business in this State is subject to franchise tax although part of its property is used in interstate commerce.**

   Where a foreign corporation does business in this State, the right to carry on its business here is subject to taxation as a franchise irrespective of the fact that part of its business is in interstate commerce, the amount of the tax not being affected by the increase or decrease in interstate business.

5. **Appeal and Error A e—Supreme Court will not anticipate constitutional questions before necessity of deciding them.**

The principles of law involved in the question of the constitutionality of a statute imposing a license or privilege tax in their ultimate correct conclusion or application will be based upon the facts in each particular case, the Supreme Court will not decide hypothetical questions when not squarely presented for decision.

6. **Taxation A d—Where minimum tax is sought to be recovered validity of taxes more than minimum levied by the statute will not be decided.**

Where a statute imposes a tax upon express companies based upon the mileage of track in this State over which they operate, levying a tax of $15.00 per mile when the net income of the company is six per cent or less, $18.00 when the net income does not exceed eight per cent, and $21.00 per mile when the net income exceeds eight per cent, and the State levies the minimum tax on an express company, which sues to recover the amount so paid, the question of the ratio of the company's net earnings in this and other States, and the amount of the net income are immaterial to the conclusion as to whether the tax is valid in the instant case, the tax levied being constant regardless of income or the ratio between interstate and intrastate business, and the validity of the higher rate of taxes levied by the statute is not directly presented for decision.

7. **Same—Franchise tax on express company in this case held not to be unconstitutional as confiscatory.**

Express companies are exempt from the operation of sections 210, 211 of chapter 345 of the Revenue Act of 1929 by section 213 thereof, and under the provisions of section 205, construed in connection therewith, the taxes imposed on express companies are State taxes upon their franchises and occupations, and counties are prohibited from levying a privilege or license tax, and the amount levyable by municipalities is limited to a sliding scale of small proportions, evidently for the use of their streets, and where a tax levied on an express company under the provisions of the statute is $15.00 per mile of track over which it operates in this State, amounting to slightly in excess of 12 per cent of its gross revenue exclusively derived from intrastate business, not taking into account large gross receipts from interstate business, it will not be held as a matter of law that the tax is unconstitutional as being confiscatory.

CIVIL ACTION, before *Daniels, J.* From WAKE.

The plaintiff alleged that it had been duly incorporated under the laws of the State of Delaware and was a common carrier of express and a public utility company "engaged in the business of carrying to, from, or throughout North Carolina, . . . money, packages, gold, silver, plate, or other articles and commodities by express," and thus is within the definition of an "Express Company," as contained in paragraph 13 of section 502 of the Revenue Act of North Carolina of 1929. Said plaintiff began operation in North Carolina on 1 March, 1929. Prior to that time the business which it now conducts had been done by the American Railway Express Company under contracts between that company and the railroads, which contracts expired on 28 February, 1929, and were not renewed. Prior to its succession to this business the Railway Express Agency purchased from the American Railway Express Company all of its property, including real estate used by the latter in the conduct of its express transportation business. This property was purchased for $30,488,114.62, which represented its true value. As against these assets the Railway Express Agency issued its bonds bearing 5 per cent interest in the amount of $32,000,000, which said bonds are now outstanding. Out of the net proceeds from the sale of the bonds the Railway Express Agency paid the American Railway Express Company the agreed purchase price of the property bought from it, retaining the balance for organization expenses and working capital. The capital stock of the Railway Express Agency consists of 1,000 shares of common stock of no nominal or par value, but which were sold at $100 per share. This sum, plus the amount realized from the sale of the bonds, constitutes the invested capital of the company.

On 1 March, 1929, the plaintiff made a contract with approximately six hundred and fifty railroad lines throughout the country, as set forth in the record. This contract so far as pertinent to the decision of the case, provided in substance that the plaintiff was to carry on such express transportation business over such lines named in the contract as was formerly carried on by the American Railway Express Company under a contract effective 1 March, 1923. The various railway companies signing the contract constituted and appointed the plaintiff as its exclusive agent for the conduct and transaction of the express transportation business upon such passenger express or mail lines of such railway company as may be agreed to. Each railway company further agreed that it would not for compensation transport valuables, money, goods or property of any description independently of the provisions of the contracts with certain exceptions therein specified. The revenue arising from the operation was to be apportioned according to the method set up in the agreement and "the balance remaining shall be designated as 'Rail Transportation Revenue,' and shall be distributed among the carriers in the group executing this form of agreement, including the Rail Company party to this agreement, in the proportion that the gross express transportation revenues on other than carload business for the month earned on the line of each such carrier bears to the gross express transportation revenues on other than carload business earned on the line of all such carriers in that group for that month." The plaintiff offered evidence tending to show that it operated in every State in the Union, and in Canada and Mexico, and that the total railroad mileage in the United States over which the plaintiff operated 1 July, 1929, was 223,629 miles, and the total railroad mileage operated by the plaintiff in the State of North Carolina on said date was 3,053 miles. "From 1 March, 1929, to and including 30 June, 1929, the plaintiff transported solely in intrastate traffic in the State of North Carolina 111,192 shipments, for which the plaintiff received revenue amounting to $122,286.69. During the same period the plaintiff received at points in the State of North Carolina interstate traffic forwarded from points without the State of North Carolina, 472,842 shipments, for which the plaintiff received revenue amounting to $762,853.98. During the year 1929, the total number of intrastate shipments handled over the entire system was 49,782,955, for which revenue amounting to $52,136,859.78 was received. The ratio of the intrastate revenue to interstate revenue wherever the company operated during the year 1929 was 18.28 per cent. The ratio of such revenue for the State of North Carolina for the same period was 16.05 per cent. The value of plaintiff's entire tangible property consisting of real estate, buildings, automobiles, trucks, and other equipment and supplies, is $30,183,482.94. The value of that part of such property, which is located in the State of North Carolina, is $136,488.33. The value of the company's real estate, all of which is located outside of the State of North Carolina, is $13,991,450.76. During the four months period of operation in question, the revenue received by the plaintiff over its entire system was $99,138,771.49, of which amount, $122,286.69 only was received from operations wholly within the State of North Carolina. Of the total revenues received from express transportation the sum of $198,593.56 represents charges to the United States Government for shipments transported during the four months period. During this period the plaintiff owned United States Government bonds to the value of $1,090,187.75, on which was received interest amounting to $14,508.72. Interest amounting to $176,455.13 was also received on bank balances located without the State."

The evidence further tended to show that the American Railway Express Company, which preceded the Railway Express Agency, and had been in operation since 1 July, 1918, made a profit upon its operations and paid dividends of slightly over 6 per cent upon its capital stock, and that "in business activities and progress, North Carolina was an average State of those through which the plaintiff operates."

The evidence further tended to show that in making comparison between the revenues of the company in intrastate commerce based on intrastate shipments on the one part and interstate shipments received at points in North Carolina from points without the State on the other part, no consideration was given to revenues arising from interstate shipments from points in North Carolina designated to points without that State.

The plaintiff was domesticated in North Carolina 23 January, 1929, and on 28 August, 1929, made a report to the defendant, Commissioner of Revenue for North Carolina, required by section 205 of Public Laws of 1929, chapter 345. Pursuant to the provisions of said Revenue Act the defendant, Commissioner of Revenue, demanded a franchise tax in the sum of $45,795.65. The plaintiff paid said sum under protest, and thereafter in due time made a written demand for a refund of said tax and the interest. The defendant, Commissioner of Revenue, refused to refund said tax and interest, whereupon this action was instituted for the recovery thereof. A jury trial was waived, and it was agreed that the trial judge should pass upon all matters of fact and law involved in the action. After a hearing, the trial judge decreed that the statute complained of, was valid and constitutional, and that plaintiff was not entitled to recover the tax, from which judgment plaintiff appealed.

Robt. C. Alston, Blair Foster and Murray Allen for plaintiff.

Attorney-General Brummitt and Assistant Attorneys-General Nash and Siler for defendant.

BROGDEN, J. The Commissioner of Revenue for the State of North Carolina found that the plaintiff operates as an express company over 3,053.31 miles of railroad within said State. Thereupon, pursuant to section 205, chapter 345 of Public Laws of 1929, he demanded the sum of $15 per mile as a franchise or license tax, aggregating $45,799.65. The plaintiff paid the tax demanded, and after complying with the proper preliminaries provided by law, brought this action to recover the sum so paid.

The pertinent portion of the statute under which the tax was levied reads as follows: "Where the net income on the average capital invested during the year ending the thirtieth day of June of the current year is six per cent or less, $15.00 per mile of railroad lines. More than six per cent and less than eight per cent, $18.00 per mile of railroad lines. Eight per cent and over, $21.00 per mile of railroad lines operated over."

At the outset the plaintiff attacks the constitutionality of the statute generally, and also upon certain specific grounds, to wit:

(a) That said statute invades the domain of the commerce clause of the Federal Constitution in that an illegal burden is directly laid upon interstate commerce.

(b) That said statute imposes a tax upon business which the plaintiff does for the United States Government.

(c) That said statute undertakes to levy a tax upon property located outside the State of North Carolina and in other jurisdictions, contrary to section 1 of the Fourteenth Amendment of the Constitution of the United States.

(d) That said statute imposes a tax which is so excessive and burdensome as to amount to a confiscation of property.

Article V, section 3, of the Constitution of North Carolina, provides that "the General Assembly may also tax trades, professions, franchises and incomes," etc. Hence, the General Assembly has the power to levy a franchise tax, and in pursuance of such power, has through a course of years imposed such taxes upon express companies doing business within the State. Moreover, the tax has always been assessed upon a mileage basis. Beginning in 1913 with a tax of $3.00 per mile the General Assembly, in substantially similar statutes, increased the tax to $5.00 in 1921, $7.50 in 1925, and to a minimum of $15.00 per mile in 1929.

In arriving at a correct and sound conclusion as to whether the taxing statute of a sovereign State enacted in accordance with the constitution thereof invades the inhibitions of the supreme law of the land, it must be borne in mind that every reasonable presumption rises and runs in favor of validity. *Mr. Justice Day,* in *Green v. Frazier,* 253 U. S., 233, clothed the idea in these words: "The taxing power of the States is primarily vested in the legislatures, deriving their authority from the people. When a state legislature acts within the scope of its authority it is responsible to the people, and their right to change the agents to whom they have entrusted the power is ordinarily deemed a sufficient check upon its abuse. When the constituted authority of the State undertakes to exert the taxing power, and the question of the validity of its action is brought before this Court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action." Furthermore, "the burden is on him who seeks the recovery of a tax already paid to establish those facts which show its invalidity." *Compania General v. Collector,* 279 U. S., 306. See, also, *Fox v. Haarstick,* 156 U. S., 674; *Heim v. McCall,* 239 U. S., 175.

All courts are agreed that the franchise of a foreign corporation or its right to carry on its business in a particular State under the protection of the laws of such State is a proper subject for taxation, irrespective of the fact that a portion of the property included in the computation is used in interstate commerce. *Mr. Justice Stone,* writing the opinion in *International Shoe Co. v. Shartel,* 279 U. S., 429, said: "A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing a local business, if apportioned to business done or property owned within the State, is not invalid under the commerce clause merely because a part of the property or capital included in computing the tax is used by it in interstate commerce." The signboards marking out the road along which a valid privilege tax must travel, are pointed out by *Mr. Justice Brandeis* in *Sprout v. City of South Bend,* 277 U. S., 163. It is there written: "But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged in exclusively interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business." *N. Y. State v. Latrobe,* 279 U. S., 421; *MacAllen v. Mass.,* 279 U. S., 620; *N. J. Telegraph Co. v. Tax Board,* 280 U. S., 338; *Western Cartridge Co. v. Emerson,* 50 Supreme Court Reporter, 283. While the principles underlying privilege and franchise taxes have been discussed in the cases above cited and numerous others referred to therein, the chief difficulty encountered in arriving at the ultimate conclusion is the correct application of correct taxing theory to particular statutes and to particular states of fact.

The statute under attack in the case at bar imposes a minimum tax of "$15.00 per mile on railroad line" when the "net income on the average capital invested . . . is 6 per cent or less." Manifestly this language means that if an express company made nothing at all, it would be required to pay the minimum tax of $15.00 per rail mile. Hence, so far as this particular record is concerned, the terms "net income" and "average capital invested" are not involved in the specific question of law presented. If, under the taxing statute, the defendant, Commissioner of Revenue, had undertaken to levy a tax of $18.00 per rail mile, which levy would necessarily involve the determination of "net income" on "invested capital," then the plaintiff would be in a position to present squarely the legal questions debated in the brief. That is to say, section 205, chapter 345, Public Laws of 1929, imposes a franchise and privilege tax of $15.00 per mile on express companies licensed to do business in this State. Said tax is the minimum tax under any and all circumstances, and, as the record is interpreted the question as to what would happen or what the legal status of the parties would be if a higher tax had been levied under the statute, is at most an interesting but at the same time hypothetical question. Appellate Courts everywhere have been slow to plunge into the field of hypothesis and speculation in deciding constitutional questions, and have ordinarily been content to rest in safety upon the wisdom of the scriptural declaration: "Sufficient unto the day is the evil thereof." This is particularly true when the apprehended evil is constitutional in its nature.

It is obvious that if the interpretation given the statute is sound, the tax does not rise as interstate business increases or fall with the diminution thereof. Nor is there evidence tending to show that it is not imposed solely on account of intrastate business transacted; neither is there anything in the record tending to show that the plaintiff would not have the right at any time to discontinue intrastate business within North Carolina. Under the facts as disclosed upon the face of the record the tax is constant and points without variation to "$15.00 per rail mile."

Therefore, as we see it, the only question presented is whether the tax of $15.00 per rail mile is so excessive and exorbitant upon its face as to amount to a confiscation of property.

Under the tax structure set up in chapter 345 of the Revenue Act of 1929 domestic and foreign corporations are required to pay franchise or privilege taxes based upon certain data contained in reports filed with the Commissioner of Revenue. See sections 210 and 211 of said chapter 345. In addition, such corporations pay the license taxes imposed by various sections of said Revenue Act. However, express companies are exempt from the operation of sections 210 and 211 by section 213, and the tax assessed against them is by virtue of section 205. It is apparent, therefore, from an inspection of the statute that the tax imposed upon the plaintiff is a combination franchise and occupation tax assessed by the State, and counties are expressly prohibited from levying a privilege or license tax, and the amount leviable by municipalities is limited to a sliding scale of small proportions. The power granted to municipalities to impose the tax is doubtless based upon the fact that the plaintiff must necessarily use the streets in the orderly prosecution of its business. The evidence discloses that the revenue produced from exclusively intrastate business was $122,286.69 for a period of four months. Hence the annual revenue from such source would be approximately $366,860.07. The revenue arising from interstate shipments received by plaintiff within North Carolina was $762,853.98 for a period of four months. Hence the annual revenue from such source would be approximately $2,288,561.94. It also appears from the evidence that the plaintiff in constructing the comparison between revenue derived from intrastate commerce "based on intrastate shipments on the one part, and interstate shipments received at points in North Carolina from points without the State on the other part" that no consideration was given to interstate shipments from points in North Carolina to points without the State. So that the volume of such business does not appear. It does appear, however, that "in business activities and progress North Carolina is regarded as an average State of those through which the plaintiff operates." Furthermore, it does appear that the "ratio of intrastate revenue to interstate revenue wherever the company operated during the year 1929 was 18.28 per cent. The ratio of such revenue for the State of North Carolina for the same period was 16.05 per cent.

The bald result is that the combined franchise and privilege tax imposed upon the plaintiff is slightly in excess of 12 per cent of its gross revenue derived exclusively from intrastate business, taking no account of other items and factors, which are worthy of consideration upon the contention that the amount is confiscatory.

There are other questions debated in the briefs with much learning and skill, but if the view of the law herein adopted by the Court is correct, all such questions become immaterial.

In conclusion, under the facts and circumstances presented or disclosed by this particular record and involved in a decision of this particular case, we cannot say that as a matter of law the tax imposed is confiscatory, and the judgment of the trial court is

Affirmed.

A. W. CRABTREE ET AL. v. BOARD OF EDUCATION OF DURHAM COUNTY AND THE TREASURER OF DURHAM COUNTY.

(Filed 29 October, 1930.)

1. **Schools and School Districts D a—Acts of appointees of school board held not to be subject to annulment by proceedings in instant case.**

   A county board of education is a body politic and corporate, and is authorized to prosecute and defend suits in its own name, and to discharge certain duties imposed by statute, C. S., 5419, and where the members of the board appointed by the General Assembly fail to take the oath of office on the date prescribed by statute, C. S., 5410, but take the oath on the next succeeding day, their failure to qualify on the day prescribed does not impair the existence of the corporate body, and where they have discharged the statutory duties imposed upon them, and no vacancy has been declared by the State Board of Education, and no proceedings in the nature of *quo warranto* have been instituted to determine their right to office: *Held*, the acts of the appointees as members of the board cannot be annulled by a proceeding to restrain the board from purchasing a school site in discharge of its statutory duties.

2. **Schools and School Districts D b—Selection of school site is within discretion of board of education and is not reviewable in absence of abuse.**

   The courts will not review the statutory discretion invested in a county board of education in selecting a site and erecting a building for a school except in the instances of abuse of this discretion, and, *Held*, in this case there was no indication of abuse of discretion, it appearing that the school board had money in hand for the erection of a proper building in a district having no school building, the children of which having attended the schools of other districts.

APPEAL by plaintiffs from *Barnhill, J.*, at Chambers in Durham County, 25 July, 1930. From DURHAM.

This is an action to restrain the board of education of Durham County from purchasing a site and erecting a school building at the intersection of the Fish Dam and Hillandale roads, to declare void the selection of the site, and to restrain the treasurer from paying out any money for the purchase of the site.

The trial judge found the facts to be as follows:

1. That the plaintiffs are residents and taxpayers of Durham County, N. C., and that some of the plaintiffs are residents and taxpayers in what is known as Hillandale Special School Tax District and that some of the plaintiffs are residents and taxpayers in what is known as West Durham Special School Tax District.

2. That the defendant, the county board of education of Durham County, is a body corporate under the laws of the State of North Carolina; that J. D. Hamlin, H. L. Umstead, W. I. Cranford, H. G. Hedrick and J. B. Mason were appointed members of the county board of education of Durham County by chapter 180, Public Laws of North Carolina, 1929. That said persons so nominated as members of said county board of education of Durham County did not qualify by taking the oath of office on or before the first Monday of April, 1929, but that all of said persons so named did take the oath of office on Tuesday following the first Monday in April, 1929. That the said persons so named discharged the duties imposed upon the members of the county board of education of Durham County until the death of J. D. Hamlin on or about 30 December, 1929; and that subsequent thereto the said H. L. Umstead, W. I. Cranford, H. G. Hedrick and J. B. Mason elected T. O. Sorrell as a successor to the said J. D. Hamlin; and that T. O. Sorrell and the other persons appointed as members of the said county board of education of Durham County by the Public Laws of 1929 have continued to discharge the duties imposed upon members of the county board of education of Durham County to the date of this hearing.

3. That the county-wide plan of organization adopted by the board of education of Durham County in 1923 in compliance with section 73-a, chapter 136 of the Public Laws of North Carolina for 1923, provided for a school building to be built in the West Durham School District at or near the underpass on State Highway No. 10 to provide a school for the children in the West Durham School District, Hillandale School District, Chambley School District and White's Cross Roads School District and that said school building has never been built.

4. That the county-wide plan of organization was amended by the board on 22 April, 1927, in part, as follows:

"All of the Hillandale School District, all of the Chambley School District, and that part of the Bragtown School District not lying within the Durham Charter District, all that part of the West Durham School District not lying within the limits of the Charter District of Durham or within the limits of the New Hope District, all of Glenn School District (including the former Elm Grove and Hebron School districts) not lying within the Carr-Oak Grove School District, all that part of Redwood School District not lying within the Carr-Oak Grove School District, all that part of White's Cross Roads School District not lying within New Hope School District." And that at said time there were 900 children in said district, and to provide schools for said children and give them proper school accommodations, schools were maintained and operated at Bragtown, Glenn and Hillandale.

5. That the Hillandale School District is a local tax district in Durham County and there is situated in said district a school building and an elementary school is maintained in said district and is attended by children from the Hillandale School District. That the West Durham School District is a local tax district in Durham County and has no school building located in said district as the children in said district now attend Bragtown schools. That what is now known as West Durham School District was formerly Chambley School District. That the Chambley School District was a local tax district, but several years prior to the extension of the corporate limits of the city of Durham said Chambley School District voted into said West Durham School District.

6. That in 1925 the corporate limits of the city of Durham were so extended as to take in the school building in said West Durham Special School Tax District, but left a large part of said West Durham Special School Tax District outside of the corporate limits of the said city of Durham. That since the corporate limits of the city of Durham were extended there has been no school building in said West Durham School Tax District, but that the children in said district have been attending Bragtown schools in accordance with the county-wide plan of organization as amended 22 April, 1927.

7. That the pleadings and evidence in this action do not show that the county-wide plan of organization, in so far as it pertains to the children in Hillandale and West Durham School Tax districts has been amended or changed since 22 April, 1927.

8. That on 4 March, 1929, the county board of education of Durham County by a vote of 3 to 2 voted to erect a new school building in the Hillandale Special School Tax District at the site of the present school building in said district. Said building was to provide school facilities

for the elementary pupils in the Hillandale and West Durham Special School Tax districts. That the said Hillandale site as selected by the board on 4 March, 1929, is located on the Cole Mill Road; an all-weather road, and that the county now owns 2½ acres of land at said site and can obtain 5 additional acres free of charge for said school site. That the city water mains run through the said site. That pure and wholesome water can be obtained by making proper connections with said mains. That an electric power line has already been constructed to said site. That the said site is about 1.4 miles from highway No. 10, about 2.2 miles from the Orange County line, about 3 miles from Bragtown School District line, about 4.4 miles from the Bragtown high school and elementary school, and about 7.4 miles from the Hope Valley School on the south.

9. That on 18 April, 1930, the said board of education of Durham County voted to reconsider and reopen the question of the location of said school building. That on 15 May, 1930, the said board by a vote of 3 to 1 voted to locate said school building in the West Durham Special School Tax District at the intersection of the Fish Dam and Hillandale roads. That at said meeting the following members were present: J. B. Mason, H. L. Umstead, T. O. Sorrell and H. G. Hedrick; that W. I. Cranford, chairman of the said board, was absent, and that J. B. Mason acted as chairman. That H. L. Umstead, T. O. Sorrell and J. B. Mason voted to locate said school at the site above named and that H. G. Hedrick voted against locating the building at said site. That W. I. Cranford, who was absent at said meeting, had previously, to wit, 4 March, 1929, voted to locate said building on the old Hillandale site.

10. That the site at the intersection of the Fish Dam and Hillandale roads is on a dirt or clay road and is only 2.8 miles from the Bragtown high school and elementary school, and is only 1.4 miles from the Bragtown School District line, and is about 3.8 miles from the Orange County line and about 9 miles from the Hope Valley school on the south. That the land for said site is not owned by the board of education, but that the said board has an option on 6 acres for said site at a cost of $1,800, and that plans and specifications have been prepared for said building. That in order to provide pure and wholesome water for said school from city water supply it will be necessary to lay a water main approximately one mile. That in order to provide electric lights for said building from Durham Public Service Company it will be necessary to build a power line approximately one-third of a mile.

11. That the county board of education has made no order consolidating the Hillandale Special School Tax District and the West Durham Special School Tax District. That said districts are both local tax districts with a different rate of tax. That there is a school building in the

Hillandale Special School Tax District. That there is no school building in the West Durham Special School Tax District, and there has been no school building in said district since a portion of said district was taken into the corporate limits of the city of Durham, but that the children in said West Durham Special School Tax District have been attending Bragtown school.

12. The court further finds that on 6 August, 1928, the county board of education of Durham County certified to the county commissioners of Durham County a resolution passed by the said county board of education of Durham County, stating that it was necessary in order to maintain the constitutional six months school term, to erect a school building in said West Durham Special School Tax District, and that pursuant to said resolution so adopted by said board of education and certified to said board of county commissioners of Durham County, a resolution was adopted by said board of commissioners of Durham County directing that bonds of Durham County be issued pursuant to the County Finance Act, and that $25,000 of the proceeds arising from said sale of said bonds be set aside for the erection and construction of a new school building in said West Durham Special School Tax District. That said bonds have been sold and that there is now available for the purpose of erecting and constructing said new school building in said West Durham Special School Tax District the sum of $25,000, which said amount was derived from the sale of bonds so sold by the board of commissioners of Durham County.

13. The court further finds that the county board of education of Durham County was acting under authority of law on 15 May, 1930, at which time it voted to locate said school in the West Durham Special School Tax District at the intersection of Fish Dam and Hillandale roads. That the members of said county board of education were acting in good faith and did not abuse their discretion in voting to locate said school building at the point herein indicated.

Upon the foregoing facts the restraining order was dissolved and the plaintiffs excepted and appealed.

Marshall T. Spears for plaintiff.
Fuller, Reade & Fuller for defendants.

ADAMS, J. The board of education of Durham County consists of five members, all of whom were appointed by the General Assembly at the session of 1929. C. S., 5410; Public Laws 1929, ch. 180. They took the oath of office, not on the first Monday of April, 1929, but on Tuesday, the day following. It is provided by statute that persons elected members of the county board of education by the General Assembly must qualify by taking the oath of office on or before the first Monday in April next succeeding their election, and that a failure to qualify within this time shall constitute a vacancy. C. S., 5414. For this reason it is contended by the plaintiffs that the acts and resolutions of the county board are illegal and of no effect.

The county board is a body politic incorporated under the name of "The Board of Education of Durham County," and in this capacity and by this title it is authorized to purchase, hold, and dispose of school property belonging to the county, to build schoolhouses, and to prosecute and defend suits for or against the corporation. C. S., 5419. The failure of the members of the board to qualify on the first Monday in April did not destroy or impair the existence of the corporate body. Moreover, until the death of one of their number the appointees discharged the duties imposed upon them; and since the appointment of T. O. Sorrell to fill the vacancy, he and the other members have regularly discharged the duties of the board. The State Board of Education has not declared a vacancy and no proceeding in the nature of *quo warranto* has been instituted to determine the question in controversy. The acts of the appointees, *de jure* or *de facto*, cannot be annulled by the present proceeding. *Burke v. Elliott,* 26 N. C., 355; *Gilliam v. Reddick, ibid.,* 368; *S. v. Graham,* 194 N. C., 459.

We have discovered nothing in the facts as found by the trial judge, or in the record, to justify the conclusion that the county-wide plan of organization has been disregarded by the defendants to the prejudice of the plaintiffs, or that the county board has abused the discretion vested in it by the law.

The Hillandale and the West Durham districts are special tax districts, having different rates of tax. The Hillandale District has a school building and an elementary school. An extension of the corporate limits of the city of Durham took in the school building in the West Durham District and left a part of the district outside the corporate limits without a building; but the sum of $25,000 is now available for the erection of a building in this district.

In these circumstances the action of the county board of education is within the exercise of discretionary powers which the courts will not undertake to control unless so unreasonable as to amount to an oppressive and manifest abuse of discretion. This principle has been maintained in a uniform line of decisions. *Brodnax v. Groom,* 64 N. C., 244; *Newton v. School Committee,* 158 N. C., 186; *School Committee v. Board of Education,* 186 N. C., 643; *McInnish v. Board of Education,* 187 N. C., 494; *Clark v. McQueen,* 195 N. C., 714.

In this case we find no such abuse of discretion as would warrant an interference with the exercise of discretion by the defendant board.

Affirmed.

FLOYD DIX v. HIGH POINT, THOMASVILLE AND DENTON RAILROAD COMPANY.

(Filed 29 October, 1930.)

Railroads D c—Contributory negligence of person walking on track held to bar his recovery of damages for injuries from being struck by train.

A motion as of nonsuit upon the evidence is properly allowed when the evidence discloses that the plaintiff was walking upon the defendant's track without taking proper precautions for his own safety, and was struck and injured by the defendant's slowly backward moving train.

APPEAL from *Schenck, J.,* at June Term, 1930, of ROCKINGHAM. Affirmed.

This is an action for actionable negligence. The plaintiff is 47 years old. On 3 June, 1929, in the day time, between 2 and 3 o'clock p.m., the plaintiff was walking on the northbound track of defendant company, between Ennis and West Green streets in the city of High Point, N. C. The plaintiff testified on cross-examination: "I came down the track to shun the mud and water. . . . The line I was walking on was the main line going to the heart of High Point. . . . I was on the northbound track. . . . Before I went on the track I looked both ways to see that there was no train in sight either way. That was the last time I looked back, as far as I know, except when something on the bank attracted my attention. That was the last time I looked for a train. It was right around a hundred yards from the Ennis Street Crossing where I was hurt. I was walking in the middle of the track. I was going to turn square to my right and go up the bank, cross the railroad line and up the bank. I was between the rails when I was struck. I was knocked down between the rails. I think I was walking at an ordinary gait. I have a good eyesight. I am very hard of hearing, not as much then as I am now. I could hear good enough to work anywhere."

Plaintiff's left arm was injured so that it had to be amputated. The evidence of plaintiff's witness was to the effect that defendant's train was backing with three or four box-cars, and he was struck by the first car on the end. No warning or signal was given of the train's approach. The train was not running very fast—eight, ten or twelve miles an hour. No one was stationed on the end car. Witnesses heard no bell ringing or whistle blow at Ennis Street Crossing. It was in evidence that the track was used as a walkway. The railroad is straight from Ennis Street and plaintiff was struck about 300 feet from Ennis Street. Plaintiff had walked between the rails, and on the northbound track as it was muddy and water was standing between the north and southbound tracks above his shoetops. There was a space of about five feet between the ends of the cross-ties, between the two tracks.

Allen D. Ivie, Jr., Walser & Casey and L. B. Williams for plaintiff.
Lovelace & Kirkman and Glidewell, Dunn & Gwyn for defendant.

Per Curiam. At the close of plaintiff's evidence the defendant, in the court below, made a motion for judgment as in case of nonsuit. C. S., 567. The court below allowed the motion, and in this we see no error. *Neal v. R. R.,* 126 N. C., 634; *Davis v. R. R.,* 187 N. C., 147; *Thompson v. R. R., ante,* 409. The judgment of the court below is

Affirmed.

ELBERT D. O'NEAL v. W. W. JONES, W. M. JONES and G. B. JONES, Trading as JONES BROTHERS.

(Filed 29 October, 1930.)

Master and Servant C c—Evidence of employer's negligence held properly submitted to the jury in this case.

In an employee's action to recover damages for an alleged negligent personal injury, evidence that plaintiff was acting under the direction of defendant's foreman with the latter's assurance that there was no danger, and was injured by a falling wall contiguous to a wall being torn down by them, is sufficient to carry the case to the jury on the issue of defendant's actionable negligence.

Civil action for damages, heard by *Barnhill, J.,* at January Term, 1930, of Carteret.

The plaintiff alleged and offered evidence tending to show that he was employed as an ordinary laborer by the defendant, and was engaged in tearing down or pushing down one of the brick walls of a school building which had been previously burned, and that, while so engaged, another wall fell, knocking him through a hole in the floor and resulting in serious and permanent injuries. There was further evidence that assurances were given by one of the defendants and a foreman that there was no danger in the work.

From judgment for the plaintiff assessing damages of $5,000, the defendant appealed.

C. R. Wheatly and Julius Duncan for plaintiff.
Moore & Dunn for defendant.

PER CURIAM. There was no allegation or issue as to assumption of risk. There was evidence of negligence, and the testimony tended to show that the plaintiff was working under the direction and supervision of one of the defendants and a foreman, and that he was doing the work according to instructions given him by said defendant and the foreman. Furthermore, there was evidence that positive assurance was given that there was no danger in doing the work according to the method adopted by the employer.

Hence the trial judge ruled correctly when he submitted the case to the jury. *Neville v. Bonsal,* 166 N. C., 218, 81 S. E., 448; *Fowler v. Conduit Co.,* 192 N. C., 14, 133 S. E., 188.

No error.

PEOPLES BANK AND TRUST COMPANY TO THE USE OF THE WAYNE NATIONAL BANK v. A. ROSCOWER.

(Filed 5 November, 1930.)

Banks and Banking H a—Statutory liability of stockholders may be enforced by bank purchasing another bank for purpose of liquidation.

Under the provisions of our statute, section 15, chapter 4, Public Laws of 1921 as amended by chapter 47, Public Laws of 1927, and chapter 73, Public Laws of 1929, either a state or national bank may purchase the assets of another bank, including the statutory liability of the stockholders of the selling bank, upon such terms as are agreed upon and approved by the Corporation Commission, and suit on the statutory liability of the stockholders of the selling bank may be instituted in the name of the purchasing bank to the use of the selling bank within three years from the date of the transfer, and chapter 113, Public Laws of 1927, now C. S., 218(c) does not repeal chapter 15, Public Laws of 1921, as amended, and is inapplicable when the liquidation is under the provisions of that act, and the amendment of the act of 1921 by chapter 73, Public Laws of 1929, being only to correct a typographical error, does not affect the right of action accruing prior to its enactment, it being significant only as legislative construction that the act of 1921 was not repealed by the act of 1927.

APPEAL by defendant from *Midyette, J.,* at August Special Term, 1930, of WAYNE. Affirmed.

This action to recover of the defendant, a stockholder of the Peoples Bank and Trust Company, a banking corporation organized under the laws of this State, now insolvent, the full amount for which said defendant is liable, under C. S., 219(a), to the creditors of said corporation, was heard on defendant's demurrer to the complaint.

The essential facts alleged in the complaint are as follows:

Prior to 13 January, 1927, the Peoples Bank and Trust Company, a corporation organized under the laws of this State, was engaged in the banking business at Goldsboro, N. C. On said day the said corporation closed its doors and ceased to do business. It was on said day, and since has been continuously, insolvent. No receiver has been appointed for said corporation, nor has the Corporation Commission taken possession of said corporation for the purpose of liquidating its affairs, as authorized by statute.

On 30 April, 1927, with the consent and approval of the Corporation Commission, first had and obtained, the said Peoples Bank and Trust Company sold and transferred to the Wayne National Bank of Goldsboro, N. C., "all of its assets of every kind, including stockholders' liability, such transfer and sale being upon the terms agreed upon and approved by the Corporation Commission and by two-thirds vote of the board of directors of said Peoples Bank and Trust Company. Said sale and transfer of assets was not only approved by a two-thirds vote of the board of directors, but was also ratified and approved by more than two-thirds in interest of the stockholders of said Peoples Bank and Trust Company, at a meeting of said stockholders duly called and held for said purpose on or about 27 April, 1927." In consideration of said sale and transfer, the Wayne National Bank assumed and agreed to pay all the debts and liabilities of the Peoples Bank and Trust Company.

After 13 January, 1927, and prior to the date of said sale and transfer of its assets by the Peoples Bank and Trust Company to the Wayne National Bank, to wit, 30 April, 1927, certain stockholders of the Peoples Bank and Trust Company, owning approximately two-thirds of its capital stock, voluntarily paid in the full amount for which each of said stockholders was liable under C. S., 219(a), and said amounts were transferred and delivered to the Wayne National Bank; said amounts have been applied by the said Wayne National Bank in payment of claims of depositors and creditors of said Peoples Bank and Trust Company. The full amount for which each stockholder of the Peoples Bank and Trust Company is liable, as an individual, will be required to pay off and discharge the claims of depositors and creditors of said Bank and Trust Company. Under its agreement with the Peoples Bank and Trust Company, the Wayne National Bank has the right to recover of said stockholders the amounts for which each is liable.

On 13 January, 1927, the defendant was, and he is now a stockholder of the Peoples Bank and Trust Company, owning twenty shares of its capital stock, of the par value of $2,000. The defendant has failed and refused to pay to plaintiff the amount, or any part thereof, for which he is liable as a stockholder of said Peoples Bank and Trust Company.

Plaintiff demands judgment in this action that it recover of the defendant the sum of $2,000, with interest thereon from 30 April, 1927, and the costs of the action.

The defendant demurred to the complaint for that the facts stated therein are not sufficient to constitute a cause of action, on which plaintiff is entitled to recover of the defendant.

From judgment overruling the demurrer, and allowing defendant time to file an answer, the defendant appealed to the Supreme Court.

Dickinson & Freeman for plaintiff.

N. W. Outlaw, Hugh Dortch and L. I. Moore for defendant.

CONNOR, J. The sale and transfer of its assets by the Peoples Bank and Trust Company to the Wayne National Bank, on 30 April, 1927, for the purpose of its liquidation, was authorized by statute. Section 15 of chapter 4, Public Laws of 1921, as amended by chapter 47, Public Laws of 1927, and by chapter 73, Public Laws of 1929, is as follows:

"Whenever the Corporation Commission shall approve it, any bank may sell and transfer to any other bank, either State bank or National bank, all of its assets of every kind, including stockholders' liability, upon such terms as may be agreed upon and approved by the Corporation Commission and by two-thirds vote of its board of directors. A certified copy of the minutes of any meeting at which such action is taken, under the oath of the president and cashier, together with a copy of the contract of sale and transfer, shall be filed with the Corporation Commission. The purchasing bank may institute suit against the stockholders in the name of the selling bank as plaintiff at any time within three years from the date of the sale and transfer and judgment in the action shall be a lien against each stockholder for the amount of stock liability."

The essential provisions of this statute were in force on 30 April, 1927. The amendment by chapter 73, Public Laws 1929, was for the purpose of correcting a typographical error in chapter 47, Public Laws 1927, and had no other effect. It is significant, however, as showing legislative construction that section 15 Public Laws 1921, as amended by chapter 47, Public Laws 1927, had not been repealed, altered or amended by chapter 113, Public Laws 1927.

This action by the Peoples Bank and Trust Company to the use of the Wayne National Bank is expressly authorized by the above-quoted statute. It appears from the allegations of the complaint, which are admitted by the demurrer, that the facts stated therein are sufficient to constitute a cause of action on which plaintiff is entitled to recover of the defendant. The contention of the defendant that chapter 113, Public Laws 1927, supersedes the statute by which the sale and transfer of its assets by the Peoples Bank and Trust Company to the Wayne National Bank was authorized, cannot be sustained. The procedure prescribed by said statute, which is now C. S., 218(c) for the liquidation of an insolvent banking corporation and for the assessment of the amounts for which its stockholders are liable under C. S., 219(a), is not applicable, when the liquidation is under section 15, Public Laws 1921, as amended by chapter 47, Public Laws 1927, and by chapter 73, Public Laws 1929.

There is no error in the judgment overruling the demurrer in the instant case and allowing defendant to file an answer to the complaint. The judgment is

Affirmed.

A. ROSCOWER v. GEORGE D. BIZZELL ET AL.

(Filed 5 November, 1930.)

Banks and Banking H b—Stockholder of insolvent bank not sustaining peculiar damage may not bring independent action against bank officers.

The officers and directors of a bank are trustees or *quasi*-trustees in respect to the performance of their official duties and are liable for either wilful or negligent failure to perform them, but a particular stockholder may not maintain an independent action against them for such negligent failure to recover for the loss of value of his stock, without allegation and proof that he has sustained a loss peculiar to himself, or allegation of demand upon the receiver to bring the action and his refusal to do so, and a demurrer to the action of such particular stockholder is properly sustained and the action dismissed.

APPEAL by plaintiff from *Midyette, J.*, at August Special Term, 1930, of WAYNE. Affirmed.

This is an action to recover of the defendants, officers and directors of the Peoples Bank and Trust Company, a corporation organized under the laws of this State, the sum of $2,000, damages sustained by plaintiff, a stockholder of said corporation, in the loss of his stock, and resulting from the insolvency of the Peoples Bank and Trust Company. In his complaint, plaintiff alleges that said insolvency was caused by the negligence and wrongful acts of defendants, as specifically alleged therein, in the performance of their official duties.

The action was heard on defendants' demurrer *ore tenus* to the complaint, for that the facts stated therein are not sufficient to constitute a cause of action, on which plaintiff is entitled to recover of the defendants.

The essential facts alleged in the complaint are as follows:

Prior to 13 January, 1927, the Peoples Bank and Trust Company, a corporation organized under the laws of this State, was engaged in the banking business at Goldsboro, N. C. On or about said day, the said corporation closed its doors and ceased to do business. Thereafter, and prior to 30 April, 1927, it was ascertained that the said Peoples Bank and Trust Company was insolvent.

On 30 April, 1927, the Peoples Bank and Trust Company sold and transferred all its assets to the Wayne National Bank, of Goldsboro, N. C., for the purpose of its liquidation. It is now wholly insolvent, and its capital stock utterly worthless. By reason thereof, the plaintiff, as the owner of twenty shares of said capital stock, of the par value of $2,000, has sustained a loss in the sum of $2,000.

Defendants are now, and for some time prior to the date of its insolvency, were officers and directors of said Peoples Bank and Trust Company, and as such had entire control and management of its affairs. The insolvency of said Peoples Bank and Trust Company was caused by the negligence and wrongful acts of the defendants, as specifically alleged in the complaint, in the performance of their official duties.

The court was of opinion that the facts stated in the complaint are not sufficient to constitute a cause of action on which plaintiff is entitled to recover, and in accordance with said opinion, sustained the demurrer, *ore tenus,* to the complaint.

From judgment sustaining the demurrer and dismissing the action, plaintiff appealed to the Supreme Court.

N. W. Outlaw, Hugh Dortch and L. I. Moore for plaintiff.

Teague & Dees, D. H. Bland, J. N. Smith, Kenneth C. Royall, J. Faison Thomson and P. B. Edmundson for defendants.

CONNOR, J. The principle is well settled that "directors and managing officers of a corporation are deemed by the law to be trustees or *quasi*-trustees, in respect to the performance of their official duties incident to corporate management, and are therefore liable for either wilful or negligent failure to perform their official duties. Therefore, if there is a loss of the corporation's assets, caused and brought about by the negligent failure of its officers to perform their duties, the corporation, or its receiver, in case of insolvency, can maintain an action therefor." This principle has been uniformly recognized, and consistently applied by this Court. *Minnis v. Sharpe,* 198 N. C., 364, 151 S. E., 735; *Braswell v. Morrow,* 195 N. C., 127, 141 S. E., 489; *S. v. Trust Company,* 192 N. C., 246, 134 S. E., 656; *Besseliew v. Brown,* 177 N. C., 65, 97 S. E., 743; *Whitlock v. Alexander,* 160 N. C., 465, 76 S. E., 538;

McIver v. Hardware Co., 144 N. C., 478, 57 S. E., 169. The principle has not been and ought not to be relaxed. Creditors and stockholders of corporations organized and doing business under the laws of this State are entitled to the strict and uniform enforcement of this principle.

However, this salutary principle, which requires of the officers and directors of a corporation, diligence and good faith in the performance of their official duties, is for the protection of the corporation, and of all its creditors and stockholders alike; it cannot ordinarily be invoked for the sole benefit of a single creditor or stockholder, who has sustained no loss peculiar to himself as a result of a breach of their official duties by the officers and directors of the corporation. Where the loss falls on the corporation, and all its creditors and depositors suffer alike, an action to recover the damages resulting from the loss can be maintained ordinarily only by the corporation, or, upon its insolvency, by its receiver, or assignee. The right of action is an asset of the corporation, which upon its insolvency vests in its receiver, or assignee, for the benefit, first, of its creditors, and, second, of its stockholders. The application of this principle secures a just and equitable distribution of any sum or sums recovered of the officers and directors of the corporation among the creditors or stockholders of the corporation, which has in the first instance sustained the loss for which its officers and directors are liable. *Wall v. Howard,* 194 N. C., 310, 139 S. E., 449; *Corp. Com. v. Bank,* 193 N. C., 113, 136 S. E., 362; *Douglass v. Dawson,* 190 N. C., 458, 130 S. E., 195; *Coble v. Beall,* 130 N. C., 533, 41 S. E., 793.

In the instant case, it is not alleged in the complaint that the Wayne National Bank, to which all the assets of the Peoples Bank and Trust Company have been sold and assigned for the purpose of liquidation, has upon demand of the plaintiff, refused or failed to institute an action against the defendants, for the recovery of the damages sustained by the Peoples Bank and Trust Company by reason of the alleged negligence and wrongful acts of defendants. *Ham v. Norwood,* 196 N. C., 763, 147 S. E., 291, is not, therefore, applicable. Nor is this action prosecuted by the plaintiff, in his own behalf and in behalf of all other stockholders and creditors of the Peoples Bank and Trust Company. Plaintiff demands judgment only for the damages which he has sustained by reason of the negligence and wrongful acts of defendants. As the loss sustained by plaintiff is not, upon the facts stated in the complaint, peculiar to him, he is not entitled to recover in this action.

We find no error in the judgment sustaining defendants' demurrer *ore tenus,* and dismissing this action. The judgment is

Affirmed.

W. D. GLOVER v. S. L. DAIL.

(Filed 5 November, 1930.)

Agriculture D b—Holder of crop lien is entitled to surplus from crop grown under contract with landlord after payment of landlord's lien.

The statutory landlord's lien, C. S., 2355, is superior to that of one furnishing supplies to the cropper, C. S., 2480, but where the cropper under a separate contract with the landlord raises a certain crop the lien for advancements attaches to such crop, and where the landlord has received the payment for the entire crop including the special crop under separate contract with the cropper and pays himself the amount due as rent, the lien for advancements attaches to the surplus and the holder of the lien may recover thereon from the landlord.

APPEAL by defendant from *Moore, Special Judge,* at October Term, 1929, of PASQUOTANK. Affirmed.

The appeal of the defendant from the judgment of a justice of the peace of Pasquotank County in this action was heard on a statement of facts agreed which are substantially as follows:

On or about 1 January, 1928, the defendant and one W. T. Forehand entered into a contract by which defendant rented to the said W. T. Forehand, for agricultural purposes, during the year 1928, a tract of land owned by the defendant and situate in Pasquotank County. The said W. T. Forehand agreed to cultivate the said tract of land, and to deliver to the defendant, as rent for the same, one-third and one-fourth of the crops grown thereon. Under this contract the said W. T. Forehand entered into possession of the said land, and made preparation for the cultivation of the same.

On 3 February, 1928, the said W. T. Forehand executed a paper-writing by which he conveyed to the plaintiff all the crops to be grown by him on the land of defendant, during the year 1928, for the purpose of securing the payment of advancements to be made to him by the plaintiff, to enable him to cultivate said land and to harvest said crops. This paper-writing was duly recorded on 4 February, 1928. It was sufficient in form to give to plaintiff a lien as provided by statute on said crops. Thereafter, on account of advancements made to him by the plaintiff, the said W. T. Forehand became indebted to plaintiff in the sum of $84.23. This sum was due and unpaid at the date of the commencement of this action.

Some time after 3 February, 1928, the defendant and the said W. T. Forehand entered into a contract by which the said W. T. Forehand agreed to plant and cultivate a crop of Irish potatoes on said land. The defendant agreed to pay to the said W. T. Forehand, for his labor in the planting and cultivation of said crop of Irish potatoes, $1.50 per barrel for all the potatoes delivered to him from said crop. It was expressly agreed by and between defendant and the said W. T. Forehand, that the latter should have no interest in or title to said Irish potatoes, but should be paid only for his labor in planting and cultivating the same, in accordance with the terms of the said contract. Thereafter the said W. T. Forehand planted and cultivated on defendant's land a crop of Irish potatoes.

W. T. Forehand died during the month of May, 1928. By agreement between defendant and a son-in-law of W. T. Forehand, the latter continued the cultivation of the crops on said land, including the Irish potato crop planted by the said W. T. Forehand, under the contracts entered into by and between defendant and the said W. T. Forehand.

On 25 June, 1928, the defendant received from the crop of Irish potatoes made on his land during 1928, by the said W. T. Forehand and his son-in-law, 175 barrels and thereby became indebted to the said W. T. Forehand, under the contract with respect to the Irish potatoes in the sum of $262.50. Defendant has paid to the son-in-law of W. T. Forehand on account of said indebtedness the sum of $104.50, and has paid to certain creditors of the said W. T. Forehand, at the request of his widow and son-in-law, the balance due on account of said Irish potatoes. Defendant has paid a sum in excess of the indebtedness due to the plaintiff on debts of W. T. Forehand for which the defendant was not liable, as landlord.

The court was of opinion that upon the foregoing facts plaintiff is entitled to recover of defendant, by reason of his lien under the paper-writing executed by W. T. Forehand, the sum of $84.23.

From judgment that plaintiff recover of defendant the sum of $84.23, with interest and costs, the defendant appealed to the Supreme Court.

Ehringhaus & Hall for plaintiff.
George J. Spence for defendant.

CONNOR, J. By virtue of the paper-writing executed by W. T. Forehand on 3 February, 1928, and duly recorded on 4 February, 1928, the plaintiff had a lien on all the crops to be grown on the land of defendant by the said W. T. Forehand during the year 1928. C. S., 2480. This lien was subject, of course, to the lien of defendant as landlord, on said crops. C. S., 2355. With respect to all other creditors of W. T. Forehand, this lien had priority. Under the contract between defendant and the said W. T. Forehand, in force at the date of the lien, the said W. T. Forehand had an interest in the crops which he could convey and on which he could give a valid statutory lien.

No contract or agreement entered into by and between defendant and W. T. Forehand, with respect to the crops to be grown on defendant's land during 1928, subsequent to the date of the paper-writing, can affect the rights of plaintiff under his lien. This lien attached to and was enforceable against all crops, including the Irish potato crop, grown on defendant's land by W. T. Forehand, during the year 1928.

Plaintiff, therefore, had a lien on the interest of W. T. Forehand in the Irish potato crop grown by him on defendant's land, under the contract in force on 4 February, 1928, and entered into by and between defendant and the said W. T. Forehand. It is apparent from the facts agreed that this interest exceeded in value all amounts due by W. T. Forehand to the defendant, for which defendant, as landlord had a prior lien. Defendant having received the value of this interest, and failed to account to plaintiff for same, is liable to plaintiff for the amount now due to the plaintiff by the said W. T. Forehand. We find no error in the judgment. It is

Affirmed.

SOUTHERN GRAIN AND PROVISION COMPANY v. ALLEN J. MAXWELL, COMMISSIONER OF REVENUE.

(Filed 5 November, 1930.)

Taxation A d—License tax on wholesale grocers who operate a cold storage chamber is constitutional as reasonable classification.

The power of the Legislature to classify subjects for the purpose of taxation is flexible, and the reasonableness of any classification will generally be construed with reference to the facts of the particular case, the predominant limitation on the power to classify being that the classification must be reasonable and not arbitrary and must rest upon some substantial difference between the classes, and that the burden must be equal upon all in the same class, and a special classification by statute of wholesale grocers operating a cold storage chamber of some character for the preservation of fresh meats, as distinguished from those who handle only canned meats not requiring refrigeration, is a reasonable classification imposing an equal burden upon all of the class, and is constitutional and valid.

CIVIL ACTION, before *Johnson, Special Judge,* at February Special Term, 1930. From WAKE.

The plaintiff is a North Carolina corporation, operating under the laws of said State and engaged in the business of buying and selling grain, hay, meat, and all kinds and classes of groceries at wholesale, and in the course of its business buys and sells meat and packing-house products, both fresh and cured. The defendant, as Commissioner of Revenue for said State, pursuant to chapter 345, section 135, Public Laws of 1929, demanded of plaintiff a license or privilege tax of $150. The plaintiff alleged that in connection with its business it had installed a refrigerating chamber in which the fresh meat products handled by it are stored. The plaintiff permits no other person to store any meats or property in said refrigerating room. The following facts were agreed to by the parties, to wit: "In addition to the facts set out in the pleadings, the following additional facts are agreed upon in this cause: There are approximately 400 wholesale grocers in the State of North Carolina. Practically all, if not all, of such wholesale grocers are wholesale dealers in meat-packing-house products, buying and selling canned goods of all sorts which are products of various and sundry meat-packing houses. Very few, if any, of said wholesale grocers either own, lease, rent or operate a cold-storage warehouse in connection with such wholesale business. Practically no wholesale dealers in meat-packing-house products either own, lease, rent or operate a cold-storage warehouse in connection with such wholesale business unless such dealer handles fresh meats, the product of meat-packing houses. Cold-storage houses are not necessary to preserving canned goods, the products of meat-packing houses. Cold-storage houses are necessary in handling fresh meats, the product of meat-packing houses. Only such wholesale grocers or dealers who operate in connection with their wholesale business a cold-storage warehouse or a cold-storage chamber of some character, are required to pay the license tax imposed by section 135 of Schedule B of chapter 345 of the Public Laws of 1929, commonly called the Revenue Act."

Upon the foregoing facts and other facts appearing in the pleadings, the trial judge decreed that section 135, chapter 345, Public Laws of 1929, was valid and constitutional and contained "a proper and fair classification for the purposes of the tax therein imposed.

From said judgment plaintiff appealed.

Connor & Hill for plaintiff.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

BROGDEN, J. The facts disclose that the plaintiff operates a cold-storage chamber, warehouse, or refrigerating room in which to preserve fresh meats owned and sold by him. Wholesale grocers or dealers in meat products are not liable for the tax unless they operate in connection with their wholesale business a cold-storage warehouse or refrigerating room of some character or description. Therefore, the sole question of law involved is whether the operation of such cold storage or refrigerating room for handling and preserving fresh meat constitutes such separate, specific and reasonable classification as the law contemplates.

The power of the State to classify for the purpose of taxation is flexible and must of necessity cover a wide range. The predominant limitation imposed by the fundamental law upon the exercise of such power is declared to be that the classification "must be reasonable and not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced should be treated alike." *Louisville Gas & Electric Co. v. Coleman,* 48 Supreme Court Reporter, 423; *Tea Co. v. Doughton,* 196 N. C., 145. Indeed, the foregoing statement of the principle, and words of like import and meaning found in the decisions, have grown into a legal formula as constant and familiar as the formula for the chemical composition of water. The legal formula is made up of two constituent elements, to wit: (a) Reasonable classification; (b) equality of burden upon all in the same class.

The courts have not set a certain and unvarying standard for determining the reasonableness of the classification and have generally been content to apply the law upon the facts as presented in the particular case. This Court in *Rosenbaum v. City of New Bern,* 118 N. C., 83, has held that a merchant selling new clothing and also second-hand clothing was subject to a separate license tax upon both branches of the business upon the theory that a classification based upon the sale of new clothing and second-hand clothing was reasonable. It is not overlooked that in the case mentioned there was an aspect of exercise of police power and yet there was a separate license tax of one dollar for the privilege of merchandising within the city and another license tax of four dollars per month for the privilege of selling second-hand clothing. The court expressly declared in reference to the four-dollar tax that "the license tax was lawfully imposed, if the municipality was clothed with the power to classify, and did not discriminate in the exercise of its delegated authority." Furthermore, this Court has held that a person engaged in the business of operating automobiles for the transportation of property for a distance of more than fifty miles was subject to a license tax, although if such automobiles or motor vehicles transported property less than fifty miles, no additional license tax therefor was required. *Clark v. Maxwell,* 197 N. C., 604. Certainly, if the sale of new clothing and second-hand clothing can be classified as separate and distinct business enterprises within the purview of license tax laws, or if trucks hauling property more than fifty miles would be subject to such license tax, then it would appear that a wholesale dealer in meat products who also operates a refrigerating room for the care and preservation of fresh meat would also be subject to classification. *S. v. Carter,* 129 N. C., 560; *Mercantile Co. v. Mt. Olive,* 161 N. C., 121; *Lacy v. Packing Co.,* 134 N. C., 567; *Armour Packing Co. v. Lacy,* 200 U. S., 227, 50 Law Ed., 451.

Affirmed.

J. R. LAWSON AND SALLIE LAWSON v. J. G. KEY AND EDWARD M. LINVILLE, TRUSTEE.

(Filed 5 November, 1930.)

Mortgages C c—Thirdly executed mortgage, secondly registered, referring to two prior executed encumbrances, is prior to secondly executed mortgage registered thereafter.

No notice, however full and formal, can replace the statutory notice of registration, C. S., 3311, and where a second mortgage is executed and delivered, but not registered until after the registration of a third mortgage, the mortgage third in execution is prior to the mortgage secondly executed and subsequently registered, and this result is not changed by the fact that the mortgage third in execution contained a reference immediately after the description that the lands were the same conveyed in a first and second deed of trust, and contained a warranty against encumbrances "except as above stated," the references being insufficient to show that the parties intended to recognize the prior instruments as superior liens.

APPEAL by plaintiffs from *Johnson, Special Judge,* at March Term, 1930, of SURRY.

Civil action to restrain sale under foreclosure of alleged third deed of trust.

Additional parties were brought in and all matters adjusted by agreement, save the single question as to the priority of liens between the alleged second and third deeds of trust.

The fact situation, bearing upon this question, is as follows:

1. On 22 April, 1924, J. R. Lawson and wife executed and delivered to A. D. Folger, trustee, a deed of trust on certain real estate in Surry County, to secure an indebtedness of $4,167.60 to R. F. Hemmings. This instrument was not registered until 19 May, following:

2. In the meantime, between the execution of the Lawson-Folger-Hemmings deed of trust and its registration, to wit, on 24 April, 1924, J. R. Lawson and wife executed and delivered to E. M. Linville, trustee, another deed of trust on the same property to secure an indebtedness of $700 to J. G. Key. This instrument was duly registered the next day, 25 April.

3. Immediately following the description of the property in the Lawson-Linville-Key deed of trust appear the words: "This being the same lands conveyed this year to the Greensboro Joint Stock Land Bank in a deed of trust for $1,392 and a second deed of trust to R. F. Hemmings for $1,400." And the warranty clause contains the recital that the premises are free and clear from any and all encumbrances, "except as above stated."

4. It is agreed that J. R. Lawson and wife, during the year 1924, executed only one deed of trust to A. D. Folger, trustee for R. F. Hemmings, the same being in the sum of $4,167.60, and that the reference in the deed of trust from J. R. Lawson and wife to E. M. Linville, trustee, for J. G. Key, is to this $4,167.60 encumbrance, though erroneously stated "for $1,400."

5. The first deed of trust to the Greensboro Joint Stock Land Bank has been paid and canceled.

From a judgment declaring the lien of the Lawson-Linville-Key deed of trust superior to that of the Lawson-Folger-Hemmings deed of trust, the plaintiffs appeal, assigning error.

Folger & Folger for plaintiffs.
W. L. Reece and E. C. Bivens for defendants.

STACY, C. J., after stating the case: Are the references in the Lawson-Linville-Key deed of trust to the prior, but subsequently registered, Lawson-Folger-Hemmings deed of trust sufficient to make the lien of the latter superior to that of the former? We think not.

The references in question do not show that the parties intended to recognize the prior instruments as superior liens, unless duly registered, and it is well-nigh axiomatic that "no notice, however full and formal, will supply the place of registration." *Piano Co. v. Spruill,* 150 N. C., 168, 63 S. E., 723.

The facts of the instant case bring it within the principles announced in *Story v. Slade, ante,* 596; *Hardy v. Abdallah,* 192 N. C., 45, 133 S. E., 195; *Blacknall v. Hancock,* 182 N. C., 369, 109 S. E., 72, and *Piano Co. v. Spruill, supra,* rather than those applied in *Hardy v. Fryer,* 194 N. C., 420, 139 S. E., 833; *Bank v. Smith,* 186 N. C., 635, 120 S. E., 215; *Bank v. Vass,* 130 N. C., 590, 41 S. E., 791; *Brasfield v. Powell,* 117 N. C., 140, 23 S. E., 106, and *Hinton v. Leigh,* 102 N. C., 28, 8 S. E., 890.

For the lien of a subsequently registered instrument to take precedence over one previously registered, it must appear that the latter was executed in subordination to the former. *Hardy v. Fryer, supra.*

Affirmed.

HENRY A. GRADY, JR., ADMINISTRATOR D. B. N. OF GEORGE HOLL, DECEASED, V. MARTHA HOLL ET AL.

(Filed 5 November, 1930.)

Insurance N a—Upon death of beneficiary of war risk insurance proceeds are to be distributed to heirs of insured as of the date of his death.

Where the father and mother of a deceased soldier have received equal monthly payments from a policy of war risk insurance of the deceased as statutory beneficiaries, upon the death of the father intestate in the District of Columbia, the commuted value of the unpaid installments payable to him should be paid to his administratrix for distribution according to the law of distribution of the District of Columbia, the right to the proceeds thereof being determined as of the date of the death of the deceased soldier and not the death of the beneficiary, there being a distinction between the right to the property itself and that of its enjoyment. *In re Estate of Pruden, ante,* 256, cited and applied.

CIVIL ACTION, before *Daniels, J.* From SAMPSON.

Louis Bauer and Martha Bauer were duly married and some time thereafter a decree of absolute divorce was procured. Subsequently Martha Bauer married George Holl. Louis Bauer and Martha Bauer had a son named George Bauer. The son went with the mother after the divorce proceedings, and assumed the name of Holl after the remarriage of his mother, and is hereafter referred to as George Holl. Louis Bauer, father of the said George Holl, had been married previously to his marriage with Martha Bauer, mother of George Holl, and had a son named Louis Bauer, Jr. After the divorce between Louis Bauer and Martha Bauer (subsequently Martha Holl), the said Louis Bauer married Katherine Fisher, who was his legal wife at the time of his death. At the time of the death of Louis Bauer he left surviving two sons, to wit, Louis Bauer, Jr., and George Holl, and his widow, Katherine Bauer. George Holl was a soldier in France and held a policy of war risk insurance, amounting to $10,000, in which no beneficiary was designated in the event of his death. George Holl died in France in February, 1919, intestate, unmarried, and without issue. Upon the death of said soldier the United States Veterans' Bureau awarded one-half of said insurance to Martha Holl, mother of said George Holl, and one-half to Louis Bauer, Sr., father of said George Holl, to be paid in monthly installments of $28.85 each. Louis Bauer, Sr., died intestate on 9 August, 1928. Thereafter, Mary E. Bauer qualified as administratrix of said Louis Bauer, Sr., and Henry A. Grady, Jr., plaintiff herein, qualified as administrator *d. b. n.* of George Holl, the deceased soldier. The commuted value of the remaining installments due Louis

Bauer, Sr., amounting to $3,045.00 was paid to Henry A. Grady, Jr., *de bonis non* of said George Holl, deceased, and said administrator now holds said money. Martha Holl, mother of George Holl, claims said sum of money less the costs and expenses of administration as the sole heir and distributee of her son, George Holl. Mary E. Bauer, administratrix of Louis Bauer, Sr., claims the said sum of money under the intestacy laws of the District of Columbia. The cause was duly heard and the trial judge ordered and decreed that the said sum of money belonged to the estate of Louis Bauer, Sr., deceased, subject only to the cost of administration upon the estate of said George Holl, and the court further ordered the plaintiff administrator to pay the fund to Mary E. Bauer, administratrix of Louis Bauer, Sr., deceased, to be administered in accordance with the laws of the District of Columbia, where said Louis Bauer, Sr., died.

From judgment rendered Martha Holl appealed.

Teague & Dees for Bauer Estate.
A. McL. Graham for Martha Holl.

BROGDEN, J. This Court has held that under policies of war risk insurance, the distributees of the deceased soldier are to be ascertained at the date of the death of the soldier in accordance with the intestate laws of the State in which the soldier lived. That is to say, that the right of property of a deceased soldier under such policies is determined by the intestate laws of such State at the time of the death, although the right of enjoyment may then be outstanding in a statutory beneficiary. The majority of the cases can be harmonized by recognizing the distinction between the right of property and the right of enjoyment. Indeed the identical question presented by the record has been expressly decided *In re Estate of Pruden, ante,* 256, and upon authority of such decision the judgment is

Affirmed.

ARTHUR M. WATERS v. LEVIN WATERS.

(Filed 5 November, 1930.)

1. **Trial F a—Submission of one issue will not be held for error where appellant has had opportunity to present all contentions to jury.**

   The submission by the trial court to the jury of only one issue will not be held for error where the appellant has been afforded ample opportunity to present all his contentions, both as to law and fact, thereunder.

2. **Appeal and Error E a—The pleadings are necessary part of record proper and where they do not appear therein the appeal will be dismissed.**

The rules of practice in the Supreme Court require among other things that the pleadings, issues and judgment shall be a part of the record proper, and this appeal, the record not including the summons or complaint, and the Court, consequently not being informed as to the nature of the action, is dismissed.

APPEAL by defendant from *Nunn, J.,* at May Term, 1930, of BEAUFORT.

Civil action presumably for debt, tried upon the following issue: "In what amount, if any, is defendant indebted to plaintiff? Answer: $125.00 with interest."

Judgment on the verdict, from which the defendant appeals, assigning as error the refusal of the court to submit other issues.

The record contains the following recital: "The judge in his charge to the jury gave the contentions of both plaintiff and defendant, and charged the law arising upon same."

MacLean & Rodman for plaintiff.
A. W. Bailey and L. M. Scott for defendant.

STACY, C. J. It appearing that each party was granted full and ample opportunity to present his contentions, both as to the law and the facts, no error can be imputed to the trial court in submitting the matter to the jury on a single issue. *Potato Co. v. Jeanette,* 174 N. C., 236, 93 S. E., 795.

Furthermore, it is provided by Rule 19, sec. 1, of the Rules of Practice in the Supreme Court that "the pleadings on which the case is tried, the issues and the judgment appealed from shall be a part of the transcript in all cases." 192 N. C., p. 847. No summons or complaint appears in the record, hence we are not properly informed as to the nature of the action. The appeal, therefore, will be dismissed for failure to send up the necessary parts of the record proper. *Plott v. Const. Co.,* 198 N. C., 782.

Appeal dismissed.

L. C. WILKINSON ET AL. v. THE BOARD OF EDUCATION OF JOHNSTON COUNTY.

(Filed 5 November, 1930.)

1. **Schools and School Districts B a—It is legislative function to formulate the means of providing six months school term.**

   It is a legislative function to formulate the means of carrying out the provisions of Article IX, section 3 of our Constitution that each county of the State be divided into school districts with one or more public schools therein to be maintained at least six months in every year.

2. **Schools and School Districts D b—Determination of number of teachers is judicial or quasi-judicial function of board of education.**

   Where the board of education of a county receiving State aid for the maintenance of its schools from the State equalizing fund has submitted its budget for the expenses of the current year to the county commissioners, and the amount thereof is reduced by the county commissioners and the reduction accepted by the board of education, making the reduction of certain items of its budget necessary; *Held*, the items of the budget which shall be affected are to be determined by the board of education, 3 C. S., 5429, and where the board, in the exercise of its judicial or *quasi*-judicial powers has reduced the number of teachers to be employed, *mandamus* will not lie to compel it to employ the number of teachers contemplated in the original budget, which number had been set in accordance with sections 16, 17, chapter 245, Public Laws of 1929. 3 C. S., 5585, 5586, 5595, 5596, 5601, 5603, 5608.

3. **Mandamus A b—Mandamus will lie only to compel the performance of a legal duty and not a judicial or quasi-judicial function.**

   Mandamus will not lie to control the exercise of discretion by a board, officer or court or of a judicial or *quasi*-judicial function, unless it clearly appears to the court that there has been an abuse of discretion, the function of the writ being to compel the performance of a ministerial or legal duty and not to establish a legal right.

APPEAL by plaintiffs from *Devin, J.*, at September Term, 1930, of JOHNSTON.

This is an application for a writ of mandamus. The plaintiffs are residents of Johnston County and committeemen of certain school districts therein. They allege that the committeemen of the complaining school districts made formal request of the board of education of Johnston County for the election of teachers conforming in number to the provisions of the sixteenth and seventeenth sections of chapter 245 of the Public Laws of 1929, and that the board, first promising compliance with their request, afterwards notified them that the number of teachers in their respective school districts would be reduced. The reduction was made by the board of education because the budget it had proposed was reduced by the board of commissioners of Johnston County. The agreed statement of facts is as follows:

1. The budget for the school year for 1930-31, as prepared by the board of education and submitted to the board of county commissioners of Johnston County provided for the number of teachers for the various schools mentioned in the pleadings in this cause, on the basis set out in sections 16 and 17 of chapter 245, enacted by the General Assembly of 1929, known as the Hancock Bill.

2. The board of education in exercising its discretion allowed two teachers for Pleasant Grove District No. 1, as it did in other schools of the same class where the average attendance for the previous year was between 35 and 45.

3. Where the average attendance in the primary grades was 110, four teachers were allowed, and one additional teacher for each additional 35 average attendance.

4. The said budget as presented to the board of commissioners provided for sufficient funds to employ teachers on the above basis.

5. The budget was regularly submitted to the board of commissioners of Johnston County for the sum of $590,250.12 for all purposes, including the salaries for the aforesaid teachers for the operation of the schools of Johnston County, for the constitutional term of six months for the school year 1930-31.

6. Thereafter the board of commissioners returned the budget allowing $538,500, which budget was accepted by the defendant, the board of education, and thereafter, on the .... day of August, 1930, the board of education reduced the number of teachers as set out in the pleadings in this action and in the other districts of the county in the same relative proportion, in order to stay within the budget as returned by the county commissioners.

7. Prior to the preparation of May budget the plaintiffs had made due request to be allowed the number of teachers for their various schools as originally allowed by the board of education, and more particularly set out in the pleadings.

Upon the foregoing facts it was adjudged that under the Public Laws of 1929, chapter 245, sections 16 and 17, the number of teachers to be employed was within the discretion of the board of education of Johnston County; that there was no abuse of discretion, and no failure to provide a term required by the Constitution, and that the application for a writ of mandamus be denied. The plaintiffs excepted and appealed.

James D. Parker, Paul D. Grady, G. A. Martin, Hugh A. Page and Wellons & Wellons for plaintiffs.

Abell & Shepard for defendant.

ADAMS, J. The relief sought is a writ of mandamus to compel the board of education of Johnston County to provide for certain schools in the county the maximum number of teachers provided for in sections 16 and 17 of chapter 245 of the Public Laws of 1929; and the only question is whether upon the agreed statement of facts the plaintiffs are entitled to the relief prayed. The controversy is thus reduced to a very narrow compass.

The Constitution provides that each county of the State shall be divided into a convenient number of districts in which one or more public schools shall be maintained at least six months in every year. Constitution, Art. IX, sec. 3. To formulate the means of meeting this requirement is a legislative function. Accordingly, it has been provided by statute that the county board of education of each county shall make an estimate of the amount necessary to continue the schools for a term of six months and that the board of county commissioners of each county shall determine and provide the amount necessary to maintain the schools for this period. From the State public school fund there is annually appropriated an amount sufficient to equalize as nearly as practicable the financial burden of supporting the schools for this term in the several counties. This "State Equalizing Fund" is apportioned by the State Board of Education to counties needing aid. Johnston is one of the counties receiving aid from this apportionment. In May the county board of education proposes a school budget for all the schools of a county for the ensuing year, setting forth the total estimated cost of maintaining all the schools of the county for a term of six months, and presents it to the board of county commissioners on or before the first Monday in June. The budget is intended to provide a current expense fund, a capital outlay fund, and a debt service fund. If the board of county commissioners approves the total amount of the budget, the board shall levy sufficient rates, after deducting the amount to be received from the State, to produce the amount asked for in the budget and to maintain the schools for six months. In the event of a disagreement between the county board of education and the board of county commissioners as to the amount of the current expense fund, the capital outlay fund, and the debt service fund they shall sit in joint session with a view to adjusting their differences, each board having one vote; and if there is a tie the clerk of the Superior Court shall act as arbitrator upon the issues joined between the two boards, each having the right of appeal from the clerk's decision. 3 C. S., 5585, 5586, 5595, 5596, 1927, ch. 239, sec. 1), 5601 (1927, ch. 239, sec. 7), 5603, 5608 (1927, ch. 239, sec. 12).

The board of education of Johnston County submitted to the board of commissioners a budget for the sum of $590,250.12 for all purposes;

and this budget would have provided sufficient funds to employ teachers upon the basis laid down in the act of 1929. The board of commissioners returned the budget, allowing $538,500, and it was accepted by the board of education. The proposed budget was thereby reduced in the sum of $51,750.12. Thereupon the board of education of Johnston County reduced the number of teachers as set out in the pleadings "in order to stay within the budget as returned by the county commissioners."

It is suggested by the defendant that the number of teachers to be "allowed" under sections 16 and 17, *supra* (P. L., 1929, ch. 245) is within the discretion of the board of education; and it was so held by the trial judge. The plaintiffs say that the sections are mandatory and that the number of teachers is definitely fixed by the average daily attendance of pupils. The phraseology is sufficiently indefinite to permit, if not to require, resort to the rules generally applied in the construction of statutes, if the determination of this question were really essential to a disposition of the appeal. But in our opinion it is not essential. If the number of teachers is a matter within the discretion of the board of education the judgment refusing the writ must be affirmed. If it is not a matter of discretion, will not the same conclusion necessarily result from the agreed facts?

The record does not disclose the items composing the reduction in the budget; but by reason of the reduction all the purposes designed by the board of education cannot be achieved. A decrease in the proposed expenditures will necessarily result from a diminution of the proposed fund. By whom shall it be determined what fund or what subdivision of a fund the deficit shall primarily affect? Manifestly by the county board of education, upon whom are imposed all powers and duties respecting public schools which are not expressly conferred upon other officials. 3 C. S., 5429. It is not contemplated that the public school system shall be kept up without adequate funds or that the county board of education shall contract debts *ad libitum* for its maintenance. In *Proctor v. Commissioners,* 182 N. C., 56, it was held that the issuance of bonds by a school district should be permanently enjoined where the statute purporting to authorize the bonds provided for a sinking fund and the taxable property of the district was not sufficient to pay the interest and provide a sinking fund which would be adequate.

If the county board of education may determine what fund or what subdivision of a fund shall primarily be affected by the deficit can the courts by issuing a writ of mandamus control the exercise of the board's judgment?

We need cite no authority in support of the proposition that mandamus cannot be invoked to control the exercise of discretion of a board, officer, or court when the act complained of is judicial or *quasi*-judicial, unless it clearly appears that there has been an abuse of discretion. The function of the writ is to compel the performance of a ministerial duty—not to establish a legal right, but to enforce one which has been established. The right sought to be enforced must be clear and complete; the writ will not be issued to enforce an alleged right which is in doubt. *Hayes v. Benton,* 193 N. C., 379; *Umstead v. Board of Elections,* 192 N. C., 139; *Johnston v. Board of Elections,* 172 N. C., 162; *Britt v. Board of Canvassers, ibid.,* 797.

Our conclusion is that the duties imposed upon the defendant in determining the effect of the deficit upon the maintenance of the schools are not entirely ministerial and that they involve at least *quasi*-judicial functions which are not subject to control by mandamus. Judgment

Affirmed.

BEN J. DIXON ET AL. v. W. E. HOOKER ET AL.

(Filed 5 November, 1930.)

Wills E b—In this case held: bequest was absolute and legatee had power of disposition of property by will.

A bequest to the testator's wife of all his personal property to have the use and benefit of as long as she may live, and in the event that she does not use it all "it is my wish and desire . . . that she give and bequeath" certain sums to designated persons, without further restraint either by residuary clause or otherwise, passes the absolute title to the personal property to the wife who may dispose of that remaining at her death as she desires, the wording of the testator's will being insufficient to impose a trust upon the property or to control her disposition thereof, and being merely an expression of his wish in regard thereto.

APPEAL by plaintiffs and by defendant, the Christian Church of Greenville, N. C., from *Barnhill, J.,* at May Term, 1930, of PITT. Affirmed.

This action arose out of a controversy involving the title to certain personal property now in the possession of the defendants, W. E. Hooker, and the Greenville Banking and Trust Company, executors of Mrs. Gertrude H. Coward, deceased.

The action involves, primarily, the construction of certain items of the last will and testament of H. L. Coward, deceased, the husband of Mrs. Gertrude H. Coward, who died in Pitt County, during the year 1922. The said items are as follows:

"Item 2. I hereby give and bequeath to my beloved wife, Gertrude H. Coward, for and during her natural life, all of my property, both real and personal, to have the use and benefit of so long as she lives."

"Item 6. My wish and desire is that in the event that my wife should not spend and use all of the personal property mentioned in Item 2 of this will for her support while she lives, that she give and bequeath at her death $1,000 in cash or bonds or stock to the Christian Church of Greenville, N. C., in which we hold membership, and the remainder of the said personal property mentioned in said item, she give and devise to my sister, Gabrella Dixon's children, but I want my wife to use and spend just as much of said personal property as she desires for her comfort and pleasure."

By other items of his said last will and testament, the said H. L. Coward gave and devised to persons named therein the real property which by Item 2 he had given and devised to his wife, for life.

Mrs. Gertrude H. Coward, by virtue of Item 2 of said last will and testament, became the owner, at the death of her husband, of certain personal property which was owned by him at his death. The personal property described in the complaint in this action is the remainder of said property, which she did not use or expend during her lifetime, for her comfort and pleasure. The title to this personal property, at her death, is the subject-matter of the controversy out of which this action arose. The said personal property is now in the possession of the defendants, executors of Mrs. Gertrude H. Coward, who died during the year 1929, having first made and published her last will and testament which has been duly probated and recorded in the office of the clerk of the Superior Court of Pitt County.

By her last will and testament Mrs. Gertrude H. Coward did not give and bequeath to the Christian Church of Greenville, N. C., the sum of $1,000 in cash, or bonds or stock; she did, however, give and bequeath to said Christian Church of Greenville, N. C., by Item 4 of her last will and testament, the sum of $5,000, "to be used as a foundation of a fund for the construction of an educational building for that church."

By her last will and testament, Mrs. Gertrude H. Coward did not give and bequeath the personal property which she owned at her death, by virtue of Item 2 of the last will and testament of her husband, H. L. Coward, to the children of his sister, Mrs. Gabrella Dixon; she did not give and bequeath to said children any property whatever, nor did she refer in her last will and testament to the provisions of Item 6 of the last will and testament of H. L. Coward, deceased. By Item 8 of her last will and testament, the said Mrs. Gertrude H. Coward gave and bequeathed "all the rest, balance, and residue of her (my) property of whatever kind, nature and description, and wherever the same may be located, to the Atlantic Christian College, Wilson, North Carolina, to be used by said college in the erection, enlargement and repair, equipment or maintenance of a library to be known as The Coward Memorial Library. The fund may be used by the college for either or all of the purposes enumerated above."

The plaintiffs in this action are the children of Mrs. Gabrella Dixon, sister of H. L. Coward, deceased, and the administrator, *de bonis non, cum testamento annexo,* of the said H. L. Coward. They and the defendant, the Christian Church of Greenville, N. C., contend that by a proper construction of Item 2 of the last will and testament of H. L. Coward, deceased, his wife, Gertrude H. Coward, was the owner, only for her life, of so much of the personal property given and bequeathed to her by said Item 2, as she did not use and spend during her life; and that by a proper construction of Item 6 of said last will and testament, the defendants, executors of the said Mrs. Gertrude H. Coward, now hold the personal property described in the complaint, in trust for the payment of the sum of $1,000 to the Christian Church of Greenville, N. C., and, after the payment of said sum, for the plaintiffs, the children of Mrs. Gabrella Dixon; and that if this contention is not sustained, that at the death of Mrs. Gertrude H. Coward, the plaintiff, administrator, *d. b. n., c. t. a.,* of H. L. Coward, was the owner and entitled to the possession of said personal property.

The defendants, the executors of Mrs. Gertrude H. Coward, deceased, and the Atlantic Christian College, on the contrary, contend that upon a proper construction of Item 2 of the last will and testament of H. L. Coward, deceased, his wife, Mrs. Gertrude H. Coward, at his death, became the owner, absolutely, and not for her life only, of all the personal property then owned by the said H. L. Coward; and that she took the absolute title to said personal property, with no trust whatever imposed thereon by virtue of the provisions of Item 6 of the last will and testament of H. L. Coward, deceased.

Upon consideration of these conflicting contentions the court was of opinion that the contentions of the defendants, other than the Christian Church of Greenville, N. C., should be sustained.

From judgment on the admissions in the pleadings and in accordance with the opinion of the court, the plaintiffs and the Christian Church of Greenville, N. C., appealed to the Supreme Court.

Louis W. Gaylord and Harding & Lee for the plaintiffs.

Lewis G. Cooper for defendant, Christian Church of Greenville.

Albion Dunn for defendants, executors of Mrs. Gertrude H. Coward.

W. A. Lucas and F. G. James & Son for defendant, Atlantic Christian College.

CONNOR, J. The law with respect to the title by which Mrs. Gertrude H. Coward took the personal property given and bequeathed to her by her husband, H. L. Coward, deceased, by Item 2 of his last will and testament, is stated in the opinion of this Court in *Jordan v. Sigmon,* 194 N. C., 707, 140 S. E., 620. Speaking of Item 2 of the last will and testament of M. D. Sigmon, involved in that case, which is almost identical in language with Item 2 of the last will and testament of H. L. Coward, involved in the instant case, *Stacy, C. J.,* says:

"It will be observed that there is no residuary clause in the will, and no limitation over so far as the personal property is concerned. Under these conditions, a gift of personal property for life to the primary object of testator's bounty, with power to use in any way that she may desire is generally construed to be an absolute gift of the property. *Holt v. Holt,* 114 N. C., 242, 18 S. E., 967; *McMichael v. Hunt,* 83 N. C., 344; *Foust v. Ireland,* 46 N. C., 184. Especially is this true when the property by reason of its amount and kind, may reasonably be expected to be consumed during the life of the donee, or within a short time after the death of the testator. *In re Estate of Rogers,* 245 Pa., 206, 91 Atl., 351, L. R. A., 1917A, 168. And this is not affected by the use of the words 'for her support, comfort and enjoyment,' as they are but terms consonant with full ownership of the property."

In *Jones v. Fullbright,* 197 N. C., 274, 148 S. E., 229, it is said: "The accepted doctrine is this: If an estate be given to a person generally or indefinitely, with a power of disposition, it carries the fee, unless the testator gives to the first taker an estate for life only, and annexes to it a power of disposition of the reversion. In that case the expressed limitation for life will control the operation of the power, and prevent it from enlarging the estate to a fee. 4 Kent Com., 520, cited in *Chewning v. Mason,* 158 N. C., 578. This doctrine has been clearly stated in reference to both real and personal property in several of our decisions, among which are *Troy v. Troy,* 60 N. C., 624; *Chewning v. Mason,* 158 N. C., 578; *Allen v. Smith,* 183 N. C., 222; *Roane v. Robinson,* 189 N. C., 628. See, also, *Roberts v. Saunders,* 192 N. C., 191. In *Long v. Waldraven,* 113 N. C., 337, the following clause in the will of John B. Doub was contested: 'It is my will that after the death of my wife my estate shall be equally divided between the heirs of my brothers and sisters, with the exception of one-third of my estate, which I leave at the disposal of my wife to be left as she may will.' The Court held that the testator's widow took a life estate in all the personalty with the power of disposing of one-third of it during her life, and that as she failed to make such disposition the personal property went to the heirs of the testator's brothers and sisters."

In *Jones v. Fullbright, supra,* it was held that where personal property was given and bequeathed by the husband in his last will and testament to the wife, for her natural life, with a limitation over, upon her death, the wife took the property only for her life, notwithstanding said property was given and bequeathed to her to be used and disposed of during her life as she might see fit. In that case it is said: "But there was a direction that the proceeds of the personal property and of the cash referred to in paragraph 5 'not disposed of by her during her life,' should be collected and sold for cash by a commissioner appointed by the court. We think it obvious that the testator thereby intended to give to his wife only a life estate in the personal property and in the cash described in paragraphs four and five of the will."

If the language used by H. L. Coward in Item 6 of his last will and testament, under a proper construction, is a limitation over of so much of the personal property given and bequeathed by him to his wife, Mrs. Gertrude H. Coward, for her life, as remained at her death, unused and unexpended by her during her life, for that said language is a direction by him that the sum of $1,000 should be paid to the Christian Church of Greenville, N. C., out of said property, and that the remainder should go to the children of his sister, Mrs. Gabrella Dixon, then under *Jones v. Fullbright,* Mrs. Gertrude H. Coward took only a life estate in said property, and there was error in the opinion of the Court to the contrary.

On the other hand, if the said language is not a limitation over, but is only an expression of the wish and desire which the testator had at the date of the execution by him of his last will and testament, and which he intended that his wife should observe or not, in her discretion, then under *Jordan v. Sigmon,* she was the owner of the property described in the complaint, absolutely, and not for her life only and the judgment of the Superior Court must be affirmed.

It is clear from the language used by the testator in Item 6 of his last will and testament that he did not give and bequeath to the Christian Church of Greenville, N. C., the sum of $1,000, nor did he give and bequeath to the children of his sister the said property or any part thereof; he was content to express a wish and desire that his wife, Mrs. Gertrude H. Coward, should make these gifts. There was no limitation over of the personal property which he had given and bequeathed to his wife for her life by Item 2 of his will, for it is manifest that it was not the intention of the testator that the Christian Church of Greenville, N. C., or that the children of his sister should take under his will; at most they were to take from and under his wife, Gertrude H. Coward.

It is also clear that the testator did not intend by the language used by him to impress upon the title of his wife to the personal property given and bequeathed to her by Item 2 of his will, any trust in favor of the Christian Church of Greenville or of the children of his sister, Gabrella Dixon. Whether or not she should give and bequeath to said church the sum of $1,000, or to said children the remainder of the personal property, given and devised to her by Item 2 of said will, and not used or expended by her during her life, was to be determined by her in the exercise of her discretion. As to the disposition of said personal property after the death of his wife, the testator was content to leave this matter to her discretion, realizing, doubtless, that the conditions under which he made his will might not exist after his death, and while his wife was living.

This construction of the language in Item 6 of the last will and testament of H. L. Coward is in accord with authoritative decisions of this Court. *Springs v. Springs,* 182 N. C., 487, 109 S. E., 839; *Hardy v. Hardy,* 174 N. C., 505, 93 S. E., 976; *Carter v. Strickland,* 165 N. C., 69, 80 S. E., 961; *St. James v. Bagley,* 138 N. C., 384, 50 S. E., 841.

We find no error in the opinion of the court in accordance with which the judgment was rendered. It is, therefore,

Affirmed.

J. L. REICH, TRADING AS WACHOVIA PAINT AND TOP COMPANY, v. I. E. TRIPLETT, O. W. BAYNES AND F. F. HOFFMAN.

(Filed 5 November, 1930.)

1. **Mechanics' Liens A b—Where possession of property from mechanic is obtained by fraudulent representations his lien thereon is not destroyed.**

   Under the common law and the provisions of our statute, C. S., 2435, one who repairs personal property loses his lien thereon by voluntarily surrendering possession to the owner, but where an automobile has been repaired and the artisan or mechanic is induced to part with possession upon false and fraudulent representations made by the owner that his check for the payment of the repairs was good and that he had sufficient funds in the bank for its payment, and the mechanic relies thereon and surrenders possession of the car, he does not do so voluntarily and unconditionally within the intent and meaning of the statute, and the mechanic does not lose his lien for the value of the repairs done by him.

2. **Same—Mechanic induced to surrender possession of property by fraud does not lose his lien as against purchaser who takes with notice.**

   Where in an action to enforce a mechanic's lien for repairs to an automobile the evidence tends to show that the owner obtained possession of the property by false and fraudulent representations, and that the defendant in possession of the property was a purchaser from the holder of a note secured by a prior chattel mortgage on the property, who had taken possession from the owner thereunder, and there is no evidence that the purchaser was a bona fide one for value without notice, the demurrer of the holder of the note and the purchaser from him is properly overruled. C. S., 567.

APPEAL by defendants, Baynes and Hoffman, from *Johnson, Special Judge,* and a jury, at June Term, 1930, of FORSYTH. No error.

This is an action by plaintiff against defendants to recover an automobile by virtue of a lien for repairs, plaintiff alleging that the owner fraudulently obtained possession of the same after the repairs were made. Defendants, Baynes and Hoffman, denied the right of plaintiff to recover and set up the plea that they were innocent purchasers for value of the automobile and without notice of any fraud.

The evidence of plaintiff was to the effect that prior to 7 May, 1929, the defendant, I. E. Triplett, was the owner of a Chrysler roadster automobile, Model 60, Car No. R-551-E. The defendant, I. E. Triplett, brought the automobile to the shop of plaintiff, who made repairs on same to the value of $162.75. The plaintiff alleged, and there was evidence to support the allegations: "That while the automobile was still in the plaintiff's possession, and was still being held by the plaintiff under his lien, the defendant, Triplett, tendered to the plaintiff a check in the sum of $162.75 drawn on the Farmers National Bank and Trust Company, Southside Branch, Winston-Salem, N. C., under date of 7 May, 1929, and that the defendant, Triplett, falsely and fraudulently represented to the plaintiff at that time that the check was good; that he had ample funds in the bank to pay the check, and that it would be honored on presentation; that such statement was false; that the defendant did not have sufficient funds in said bank to pay the check; that the same was presented in a reasonable time; that the plaintiff did not know, and had no reason to believe that the check was not good, and reasonably relied on such false and fraudulent representations, and in reliance thereon surrendered the possession of the automobile to Triplett."

Stipulation: "It is admitted that the defendant, O. W. Baynes, was the owner of the note secured by the chattel mortgage referred to in the complaint at the time the repair work was done on the automobile and the check dated 7 May, 1929, was given."

It was also in evidence that after the alleged false and fraudulent representations made by the owner to obtain the possession of the automobile, Baynes took the automobile, under the note secured by the chattel mortgage, and sold it to Hoffman, but there is no evidence on the record that Hoffman purchased it for value and without notice of the alleged fraud.

Defendants offered in evidence the note referred to in the "Stipulation" heretofore made, being in the amount of $360, dated at Winston-Salem, N. C., 21 March, 1929, payable to C. E. Brown, or order, payable in stallments of $30 on 21 April, 1929, and a like sum the 21st day of each and every month until paid, signed by I. E. Triplett and Lake Triplett, endorsed "C. E. Brown."

Defendants offered in evidence the chattel mortgage, being from I. E. Triplett and wife, Lake Triplett, to N. S. Myers, for C. E. Brown, dated 21 March, 1929, covering Chrysler roadster, Motor No. 56529, Serial No. R-551-E, filed for registration 28 March, 1929, in the office of the register of deeds for Forsyth County, and registered 29 March, 1929, in Book 256 of Mortgages, page 220.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the plaintiff entitled to a lien under section 2435 of the Consolidated Statutes for repairs to the automobile described in the complaint in the amount of $162.75, prior to the delivery of the automobile to I. E. Triplett? Answer: Yes.

2. Did the plaintiff surrender possession of said automobile to I. E. Triplett upon false and fraudulent representation of the said I. E. Triplett that a check given in payment of said repair bill was good, as alleged in the complaint? Answer: Yes.

3. At the time the plaintiff made repairs on the said automobile, was the defendant, O. W. Baynes, the owner of a chattel mortgage, duly executed and registered, and if so, what was the amount of said chattel mortgage? Answer: Yes, $360.

4. What was the fair market value of said automobile at the time the same was sold by the defendant, Baynes, to his codefendant, Hoffman? Answer: $275.

5. What was the fair market value of the said automobile at the time of the institution of claim and delivery proceedings? Answer: $250."

Parrish & Deal for plaintiff.
Hastings & Booe for defendants.

CLARKSON, J. At the close of plaintiff's evidence, and at the close of all the evidence, the defendants made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions, and in this we see no error.

The question involved: Did the plaintiff, who had a lien for repairs, under C. S., 2435, and the common law, lose his lien as against the defendants, who claim under a prior recorded mortgage, when he was induced to part with his possession by false and fraudulent representations of the owner? We think not.

C. S., 2435, in part, is as follows: "Any mechanic or artisan who makes, alters or repairs any article of personal property at the request of the owner or legal possessor of such property has a lien on such property so made, altered or repaired for his just and reasonable charge for his work done and material furnished, and may hold and retain possession of the same until such just and reasonable charges are paid," etc. The statute further provides that, if the charges for repairs are not paid, the property in a certain way can be sold to pay for the repairs.

In *Johnson v. Yates,* 183 N. C., 24, it is held, at p. 27, that this statute "is applicable to any and all contracts by mortgage or otherwise subsequently made and entered into. . . . A further consideration of the statute will disclose that the lien provided for can only arise when the alterations or repairs are made at the instance of the 'owner or legal possessor of the property.' "

From the statute and the construction put upon it in the *Johnson case, supra,* the plaintiff had a lien superior to the defendants' mortgage for the repairs made on the automobile.

At common law where a laborer repaired a wagon and surrendered it to the owner before payment, the laborer has no lien. Possession is necessary to the existence of the lien. *McDougall v. Crapon,* 95 N. C., 292; *Tedder v. R. R.,* 124 N. C., 342. The lien on personal property given by this section applies when possession is retained by the mechanic. *Glazener v. Gloucester Lumber Co.,* 167 N. C., 676. If the mechanic or artisan surrenders possession of the property, he loses his lien. *Block v. Dowd,* 120 N. C., 402; *Tedder v. R. R., supra;* 17 R. C. L., at p. 606.

In *Auto Co. v. Rudd,* 176 N. C., at p. 499, we find: "Defendant, in payment of the claim, gave plaintiff a check on the bank for the amount, importing a cash payment, and thereby plaintiff was induced to surrender the possession of the car. Defendant, believing that the repairs had been of no benefit, stopped payment of the check, but when he does so he must restore plaintiff's possession and put him in the position to enforce his mechanic's lien for the amount due. No doubt the defendant had no fraudulent purpose in giving the check, and the jury have found that there was no actual fraud, but having obtained possession of his car under a promise to pay cash, on refusal, he is estopped to resist enforcement of mechanic's lien by reason of the possession thus acquired."

In the present case the jury, under a careful and proper charge by the court below, setting forth every element for the jury to pass on necessary to constitute fraud, found that plaintiff surrendered the possession of the automobile "upon false and fraudulent representations." This finding makes the present case similar, if not stronger for the plaintiff than the case of *Auto Co. v. Rudd, supra.* The possession of the automobile was not surrendered voluntarily and unconditionally.

An analogous case, sustaining the view here taken, is *McGill v. Chilhowee Lumber Co.,* 111 Tenn., p. 552, 82 S. W., 210, 37 C. J. "Liens," sec. 57, at p. 336-7.

From the position here taken as to the law applicable upon the facts in this action, we see no sufficient evidence on the record to sustain defendants' contention that plaintiff waived the lien at the time he parted with the possession or in the delay in not repossessing the automobile. Under the facts in this case defendants are not *bona fide* purchasers of the automobile in controversy for value and without notice of the fraud. Although in their answer defendants set up the plea that they were bona fide purchasers for value and without notice, there is no evidence on the record to sustain this view. There is no evidence on the record that Hoffman purchased the automobile in controversy for value and without notice of the false and fraudulent representations made to plaintiff by the owner to obtain possession of the automobile. Baynes, it is admitted in the stipulation, owned the note secured by the chattel mortgage on the automobile at the time the repairs were made. It was in evidence that Baynes took possession of the automobile as the owner of the note secured by the chattel mortgage after the repairs were made, and sold same to defendant, Hoffman; but there is no evidence on the record that Hoffman purchased the automobile for value and without notice of the fraud. *Brown v. Sheets,* 197 N. C., at p. 273, 63 A. L. R., p. 1357. In fact, the defendants tendered no issue that Hoffman was a purchaser for value and without notice of the fraud.

The issues submitted were proper and determinative of the controversy. We see no error in the charge of the court below. In signing the judgment in favor of plaintiff, we find

No error.

O. L. CHAMBERS, ADMINISTRATOR OF THE ESTATE OF O. L. CHAMBERS, JR., DECEASED, v. WINSTON-SALEM SOUTH BOUND RAILROAD COMPANY AND RICHARD JONES.

(Filed 5 November, 1930.)

Railroads D b: Negligence B c—Where evidence shows that intervening negligence was sole proximate cause of injury, nonsuit is proper.

Where in an action against a railroad company and the driver of an automobile the evidence tends to show that the engineer of the defendant's train failed to give any warning of his approach to a public crossing in a city, and that the driver of the automobile approached the crossing at an excessive rate of speed, that he could have seen and heard the train before reaching the crossing, but that he did not slacken his speed, and that he hit the plaintiff's intestate who was standing on the sidewalk and knocked him under the train, resulting in death: *Held,* the negligence of the driver was the sole proximate cause of the injury insulating the negligence of the railroad company, and they may not be held as joint *tort-feasors,* and the demurrer of the railroad company was properly allowed.

APPEAL by plaintiff from *Clement, J.,* at June Term, 1930, of FORSYTH. Affirmed.

This was an action for actionable negligence brought by plaintiff, administrator of his son, against defendants.

Among other defenses the defendant Winston-Salem South Bound Railroad Company says: "That there was no unity or concert of action, on the state of facts, as alleged by plaintiff in his complaint, between Winston-Salem South Bound Railroad Company and Richard Jones, defendants herein; that the acts of Richard Jones were the criminal acts of an independent third party, unexpectable and unforseenable by this defendant, completely insulating any other negligent act, if any, which are expressly denied, and solely and proximately causing the injuries complained of by plaintiff; and, that such acts on the part of Richard Jones are entirely separable from any other acts complained of by plaintiff."

On 12 February, 1928, about 3 o'clock p.m., the plaintiff's intestate, a lad 10 years of age, was standing about 10 feet of West Street crossing, in the city of Winston-Salem, N. C., on the sidewalk of the west side of the crossing. He was about 10 feet west of the railroad track. He was struck from the rear by an automobile driven by Richard Jones, the defendant, and knocked under the train and killed.

The plaintiff's witness, Edith Dudley, testified, in part, as follows: "On the afternoon of this collision, about three o'clock, I was on the porch, standing in the door, and I saw the train approaching this intersection and saw the automobile in which Richard Jones was driving approaching the intersection from the west. In my opinion, when the automobile had reached a point some fifty feet from the railroad track it was going between thirty and thirty-five miles an hour. In my opinion, when the train was within fifty feet of the crossing, it was coming at about twenty miles an hour. I couldn't hardly say how far south of West Street the train was when the automobile was fifty feet away from the crossing, but I think if the Jones boy had not turned off they would have just about met, but by him turning off he hit the rear of the engine, the best I could see. I mean that if the automobile had come straight on they would have gotten there at the same time.

I didn't hear the bell on the train ringing, and I didn't hear the signal bell at the crossing ringing. . . . When the Jones boy's car got below the Perryman Lumber Company's building there was nothing to obstruct his view. The Jones boy's car didn't slack its rate of speed much, if any, and when it got down almost to where the train was, it whirled and knocked the little Chambers boy under the train. The Chambers boy was on the sidewalk, about ten feet from the track, and he struck the Chambers boy going between thirty and thirty-five miles an hour, and knocked him from ten feet back under the engine of the train. I didn't go down to the place right then. I wanted the bell to ring bad enough to notice that it didn't ring. The Jones boy could have seen the train if he had been looking at it. . . . It was raining and the train was coming up grade, with some few cars on the train, and it was making plenty of noise—enough noise so I could hear it all right. I could see the smoke of the engine and could hear the wheels of the engine slipping on the track. . . . I am a nurse, but I was not working anywhere at that time. . . . I saw the Chambers boy standing about ten feet of the crossing, on the west side of the crossing, and the Jones boy's automobile coming at a rate of speed of thirty to thirty-five miles an hour, and it checked its speed little, if any, at the time it swerved to the right and hit the Chambers boy. The little Chambers boy was looking toward the train and was struck from behind by the car driven by Jones going at from thirty to thirty-five miles an hour. After the Chambers boy was hit by the train I saw his feet turn up—saw him kicking. I know the little Chambers boy was standing on the sidewalk at the time the automobile struck him, and he looked to be about ten feet west of the railroad track. . . . From the time I first saw the car up about the Perryman Lumber Company building, going thirty or thirty-five miles an hour, until it crossed the curb and hit the boy, it might have slowed up some, but didn't slow up much. I was looking right down that way and saw the child when he was struck. The child was knocked under the tender of the engine, and a part of the engine was across the street. I could see under the engine and could see the car, see where the boy was standing, see them pull the boy out and all from under the engine. I saw the child knocked under the engine."

There was nothing to obstruct defendant Richard Jones's view within 94 feet of the railroad crossing. West Street is an improved street about 24 feet in width and a much traveled thoroughfare.

John D. Slawter and Richmond Rucker for plaintiff.

F. M. Rivinus, Parrish & Deal and Craige & Craige for defendant, Winston-Salem South Bound Railroad Company.

PER CURIAM. The defendant, Winston-Salem South Bound Railroad Company, at the close of plaintiff's evidence, made a motion in the court below for judgment as in case of nonsuit. C. S., 567. The motion was allowed, and in this we can see no error.

The plaintiff alleges and contends that the injuries sustained by plaintiff's intestate which directly caused the death which ensued, were due to and proximately caused by the concurrent negligence of the defendant Railroad Company and the defendant Richard Jones. The plaintiff further contends that the evidence adduced at the trial of the cause, in support of his allegations and contentions, was sufficient to take the case to the jury. We cannot so hold.

We think this case is controlled by the principles laid down in *Lineberry v. R. R.,* 187 N. C., at p. 794: "This violation of a town ordinance made the defendant guilty of negligence *per se,* but that negligence must be the proximate cause of the injury to young Lineberry. In the present case the testimony of the young lad, Lineberry, was that his companion, another young lad who was with him, pushed him under the moving train. This was the intervening, independent, sole proximate cause of the injury, for which the defendant cannot be held liable. The injury was not the natural or probable consequence of defendant's negligence in exceeding the speed limit. Pushing the boy under the train was the proximate cause of the injury. It was an unfortunate and deplorable tragedy, but defendant is in no way responsible for the act of the Qualls boy."

The judgment of the court below is

Affirmed.

STATE v. SHERMAN HALL AND ROOSEVELT REYNOLDS.

(Filed 5 November, 1930.)

1. **Trial B c—Exception to admission of evidence will not be sustained where same evidence has been admitted without objection.**

An objection to the admission of the testimony of a witness will not be sustained on appeal where the same testimony has been given by another witness without objection.

2. **Criminal Law G b—Evidence in this case held admissible as a part of the same transaction.**

Where in a prosecution for manufacturing and possessing materials for the manufacture of intoxicating liquor a witness for the State has testified that the two defendants had brought a still to his place and had set it up in a field and manufactured whiskey, and had told officers where the whiskey could be found: *Held,* the finding of the whiskey at the place designated is incompetent as an independent fact, but taken in connection with the evidence that the defendants were acting together in procuring a still and manufacturing whiskey, it was a part of the same transaction, and the admission of testimony of another witness corroborating the declaration of the first as to the location of the whiskey is not error.

CRIMINAL ACTION, before *Cranmer, J.,* at July Term, 1930. From HERTFORD.

The defendants were indicted upon a bill containing counts for manufacturing, possession of materials designed for the manufacture of whiskey, and illegal possession of intoxicating liquor for the purpose of sale.

The evidence tended to show that one Herbert Beverly told officers searching his premises that a liquor still and thirty-five or forty gallons of mash found thereon belonged to the defendants, and that said defendants had brought the still to his place, together with some mash and sugar, and thereafter carried the still and set it up in the field and made whiskey. Thereafter a witness for the State named Vann testified as to the statement made by Beverly at the time of the search. The defendants were not present at the time of the search or of the conversation.

The jury rendered a verdict of guilty, and upon judgment thereon the defendants appealed.

W. D. Boone, Stanley Winborne and Alvin Ely for defendants.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

PER CURIAM. The defendants excepted to certain declarations of a witness for the State named Vann, tending to show that they had engaged in the manufacture of intoxicating liquor and were the owners of a still found at the home of the witness Beverly. However, the witness Beverly had previously testified to substantially the same facts without objection. Hence the exception cannot be sustained. *Shelton v. R. R.,* 193 N. C., 670.

At the time of the search the officers inquired of the witness Beverly where the whiskey was, and said witness told them where it could be found. Thereafter a keg was found at the home of Clayton Hall, a brother of defendant, Sherman Hall, and with whom the defendant Sherman lived. The finding of this keg would be incompetent as an independent fact, but it appears upon the record that the defendants, Hall & Reynolds, were acting together in procuring a still, setting it up and actually manufacturing whiskey. Hence the testimony objected to was a part of the same transaction. Furthermore, the testimony tended to corroborate witness Beverly, who told the officers where they could find the whiskey so manufactured.

No error.

BOYD & GOFORTH v. FIRST NATIONAL BANK OF WEST JEFFERSON ET AL.

(Filed 5 November, 1930.)

Venue A b—Venue of action involving official conduct of municipal officers is county wherein municipality is situate and alleged acts took place.

An action involving the official conduct of the officers of an incorporated town in a certain county has its proper venue in that county, and where the town and others have been made defendants the action is properly removed there from another county.

APPEAL by plaintiffs from *Finley, J.*, at July Term, 1930, of ASHE. Affirmed.

J. F. Flowers for plaintiffs.
T. C. Bowie for defendants.

PER CURIAM. This action was begun in the Superior Court of Mecklenburg County. One of the defendants is the town of West Jefferson, a municipal corporation in Ashe County. The Superior Court of Mecklenburg, upon motion made in apt time, removed the cause to Ashe County. Thereafter the plaintiffs lodged a motion in the Superior Court of Ashe County to remand the cause to Mecklenburg. The motion was denied and the plaintiffs excepted and appealed. The facts found by the trial judge and set out in the record fully warrant the order refusing the plaintiffs' motion to remand the cause. The action involves the official conduct of the municipal officers of West Jefferson in the county of its situs and the proper venue is Ashe County. *Cecil v. High Point,* 165 N. C., 431. Judgment

Affirmed.

STATE v. BRYANT SIZEMORE AND GASTON SIZEMORE.

(Filed 12 November, 1930.)

1. **Statutes B a—Clerical error in amendatory statute may be corrected by the courts in order to carry out legislative intent.**

The courts will correct a clerical error appearing by reference to the former statute in the repealing one when it is plain by construing the two together that the error was purely a clerical one and that to permit it to stand would defeat the intent of the Legislature and to correct it will clearly carry out the intent; and, when necessary the amendatory reference to a section in the former statute will be read into the statute in the place of the section specifically referred to.

2. **Same—Amendment to State Game Law held to contain clerical error in reference to repeal of former statute which will be corrected.**

Where an amendment to our game law contemplates in express terms the continuance of a tax by the department of conservation and development for the repayment of a sum of money, in a certain amount, to be advanced by the State Treasurer out of general funds for its initial expenses, and the amendment repeals a section by reference to number that would defeat this intent, and by reading in another section of the same act the intent would be clearly enforced: *Held*, the error is a clerical one which the courts by interpretation will correct so as to carry out the clearly expressed intent of the Legislature.

3. **Game A b—Held: foxes may not be hunted without a license under the provisions of State Game Law.**

When foxes are defined as a wild animal by a State Game Law, requiring a license to be charged for hunting wild animals, applying to a county that has no closed season for the hunting of foxes: *Held*, the license is required though as to the particular county the time is not restricted for the hunting of foxes.

4. **Game A a—State Game Law makes county game commissions subordinate to State Commission and to this extent modifies C. S., 2079-2086.**

The effect of the North Carolina Game Law is to make county game commissions subordinate to the State Commission, the powers of the former being merely advisory or recommendatory until approved by the State Commission, and to this extent C. S., 2079-2086 are amended thereby.

APPEAL by defendants from *McElroy, J.*, at March Term, 1930, of STOKES.

Upon separate warrants issued by a justice of the peace the defendants were convicted of a violation of the North Carolina Game Law, and from the judgment pronounced they severally appealed to the Superior Court. By consent the cases were tried together; the defendants were convicted, and each appealed from the judgment of the Superior Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Dallas C. Kirby for defendants.

ADAMS, J. The defendants were convicted of hunting foxes in Stokes County in breach of certain provisions of the North Carolina Game Law, and they assign as the basis of their appeal from the judgment the refusal of the trial court to sustain their demurrer to the evidence and to dismiss the action. C. S., 4643.

The warrants charge the defendants with a violation of the law in October, 1928. The act, known by the short title of "The North Carolina Game Law," went into effect on 1 June, 1927. Public Laws 1927, ch. 51. Section 27 contains this provision: "No person shall at any time take any wild animals or birds without first having procured a license as provided in this act, which license shall authorize him to hunt or trap only during the periods of the year when it shall be lawful." The defendants say that this section was repealed by Public Laws 1927, ch. 250, in the following clause of the fourth section: "That section twenty-seven of 'The North Carolina Game Law' is hereby specifically repealed." If section 4 contained nothing more, the defendants' argument would be conclusive on this point. But it further provides: "And the following shall be inserted in lieu thereof: Department of Conservation and Development Authorized to Advance Funds. In order to pay the initial expenses, including the purchase of supplies, printing and distribution of licenses and for all other necessary expenses for the enforcement of this act pending receipt of the first year's hunting licenses, the State Treasurer is hereby authorized and directed to advance out of the State appropriation allotted by the General Assembly of nineteen hundred and twenty-seven to the Department of Conservation and Development a sum not to exceed ten thousand dollars. This amount shall be refunded to the account of the Department of Conservation and Development out of the first moneys received under 'The North Carolina Game Law.' All vouchers involving expenditures and the amount so advanced by the Department of Conservation and Development shall be approved by the director of said department."

It is perfectly clear that the General Assembly intended to repeal section 26 and not section 27 of chapter 51. The amendment set out in section 4 of chapter 250 does not purport to deal with the subject-matter of section 27, but with that of section 26; section 4 of chapter 250 and section 26 of chapter 51 provide an appropriation for the initial expenses necessary for the enforcement of the act. If the amendment set out in section 4 is inserted in section 27, not only will section 26 conflict with the amendment, but the plain purpose of the law will be destroyed by abolishing all the provisions relating to the license and the revenue intended thereby to be raised. In these circumstances it cannot reasonably be doubted that the words, "section twenty-seven" in section 4 of chapter 250 were erroneously substituted in lieu of the words "section twenty-six." This conclusion finds support in the fact that section 4 was repealed by the General Assembly at the session of 1929. Public Laws 1929, ch. 278, sec. 2. This situation raises a question as to the effect of an error which is apparent upon the face of a statute and the nature of which is ascertainable from the statute itself.

In the construction of statutes one of the fundamental rules is that clerical errors which if uncorrected would destroy an act or defeat its intended operation, will not vitiate the act, but will be corrected if the legislative intent is apparent. Rectifying an obvious error is not correcting an act of the Legislature; it is giving effect to the legislative intent as indicated by the context, in which the real purpose is manifest. It is the province of the Court to correct such errors when they are obvious and particularly when a literal interpretation would involve an obscurity. Black on Interpretation of Laws, sec. 37; *Fortune v. Commissioners,* 140 N. C., 322. This Court has applied the principle in *Improvement Co. v. Commissioners,* 146 N. C., 353, in which it was held that by a clerical error the words "Washington County" had been substituted for Robeson County; in *Murphy v. Webb,* 156 N. C., 402, in which it was said that a reference to certain Public Laws instead of Private Laws was a clerical error which was subject to correction by the courts; and in *Toomey v. Lumber Company,* 171 N. C., 178, in which the Court quoted with approval the decision in *People v. King.* 28 Cal., 266, to this effect: "If a section in an amendatory act refers to a section of the act amended by number, and the section referred to does not express the legislative intent, but another section is found which does express that intent, the reference will be treated as being made to the latter section."

Adhering to this rule of construction we are led to the conclusion that section 4 of chapter 250 was intended to repeal and does repeal section 26 of chapter 51 of the Public Laws of 1927, and that section 27 was not thereby vitiated or impaired.

As above pointed out, section 27 provides that no person shall take any wild animals without having a license, which shall authorize hunting only "when it shall be lawful." Stokes County had no close season for foxes, and for this reason the defendants took the position that they had a right to hunt these wild animals without a license. This is a misconception of the statute. "No person shall at any time take any wild animals without first having procured a license." When a hunter has the license he may hunt in the open, but not in the close season; but he may not hunt in either season without a license.

The defendants question whether the North Carolina Game Law repeals sections 2079-2086 of the Consolidated Statutes. Stokes is one of the counties in which by virtue of section 2079, the game laws were administered through the county game protection commission and in which licenses issued by the Audubon Society were not good. But the Audubon Society was dissolved and the acts relating to its incorporation (C. S., 2087-2097) were repealed by chapter 51, section 39, of the Public Laws of 1927; and in section 42 it was enacted that whenever existing laws are in conflict with chapter 51, the latter shall be construed to repeal the former and to vest in the State Game Commission the administration of all laws relating to game conservation. In section 18 it is provided that chapter 51 shall not be construed to dissolve any of the county game commissions or to prohibit their creation, but that the powers of the county commissioners shall be of a nature advisory and recommendatory to the State Game Commission and that the exercise of any powers by them shall require the approval of the State Game Commission. The effect is to make the county commissions subordinate to the State Commission and to clothe them with powers which are merely advisory or recommendatory until approved by the State Commission. To this extent the former law is repealed. This policy is upheld by the provisions of chapter 253 of the Public Laws of 1927.

We discover no fatal inconsistencies in the several sections of the North Carolina Game Law. A fox, defined as a game animal in section 2 is, nevertheless, a wild animal within the meaning of section 27. If there is no close season for foxes they may be taken not only with dogs, but "in any manner" (section 33); but unless he have a license the hunter may not take foxes with or without dogs. The provision that the license shall be void after the first day of April does not imply that another may not be procured by proper application and with due regard to the open and close seasons. We find

No error.

L. A. MARTIN AND T. H. BARKER v. THE BOARD OF TRUSTEES OF THE LEAKSVILLE TOWNSHIP PUBLIC SCHOOL DISTRICT.

(Filed 12 November, 1930.)

1. **Corporations C a—Failure of corporation to elect officers or directors does not generally end terms of those previously elected.**

Where an educational institution, incorporated by private act of the Legislature, is granted a charter providing that four of the trustees named therein should hold office for the period of one year, and four others for a period of two years, and four others for a period of three years, and that their successors should be elected for a term of three years, and there is no provision that the trustees should hold office until their successors are elected, upon the trustees named in the charter continuing in office after the expiration of their term as provided therein: *Held,* no one but the corporation can be heard to complain, the general rule being that the failure of a corporation to elect officers or directors does not necessarily end the terms of those previously elected.

2. **Corporations G d—In this case held: corporation and trustees conveyed good and indefeasible title to purchaser.**

Where the charter of an educational institution authorizes the trustees to hold real and personal property for the corporation, and a deed is executed conveying the title to land to the trustees, and the trustees

> authorize a deed of trust from the corporation which is executed as its deed, and the deed of trust is foreclosed according to its terms, and the trustee in the deed executes a deed to the purchaser, and the trustees of the institution also execute a deed to the property to the purchaser at the sale: *Held*, neither the corporation nor the trustees can claim any interest in the property and the conveyances conveyed the legal and equitable titles, respectively, to the purchaser at the sale who may transfer a good and indefeasible title thereto, and the fact that at the time of the execution of the deed by the trustees their terms of office under the charter had expired and their successors not elected does not alter this result, and the vendee of the purchaser at the foreclosure sale may not successfully maintain that the title offered was not good on account of the failure of the corporation to elect successors to the original trustees named in the statute.

APPEAL by defendant from a judgment of *Finley, J.*, at Chambers in ROCKINGHAM.

Civil action to compel the defendant to accept a deed for real estate tendered by the plaintiffs and to pay the purchase price. The case was heard upon the following agreed statement of facts:

The defendant entered into a contract with the plaintiffs for the purchase of certain real estate described in the complaint filed in this cause; the plaintiffs tendered a deed to said real estate and the defendant refused to accept said deed, insisting that said deed did not convey a good and sufficient title to the property as the plaintiffs contracted to deliver.

By a private act of the General Assembly of 1905, chapter 185 of Private Laws of 1905, the Leaksville-Spray Academy was chartered as a corporation for the purpose of conducting a school in the town of Leaksville, North Carolina, but thereafter, the name of said institution was changed to Leaksville-Spray Institute by an act of the General Assembly of 1907, Private Laws, chapter 104, and when said institution was chartered the following parties were named as trustees: W. S. Williams, R. V. Osborne, T. Lee Miller, J. B. Hill, J. P. Wilson, Dr. John Sweeney, J. B. Fagge, Dr. Thos. G. Taylor, D. F. King and A. E. Millner; according to section 4 of said charter, "That the full term of office of trustees shall be three years: *Provided,* that the first four mentioned in section three of this act shall hold office until the annual meeting of the said incorporators of the Leaksville-Spray Academy in nineteen hundred and six, and the second four until said meeting in nineteen hundred and seven, and the third four until said meeting in nineteen hundred and eight, and their successors for a term of three years from the date of their election; subject, however, to removal on the part of said incorporators for improper conduct, inefficiency or neglect of duty. Vacancies caused by death or removal from office may be filled by the board of trustees until the next annual meeting."

No one has ever been elected or qualified to succeed the trustees originally named in the charter of 1905, and there is no provision in said charter that the said trustees shall hold office until their successors are elected and qualified. On 30 November, 1923, a meeting was held by the said trustees in accordance with a call issued to all living trustees; at said meeting A. E. Millner, J. P. Wilson, W. S. Williams, T. Lee Millner, B. F. Ivie, and J. B. Taylor, six of the original twelve trustees, were present; trustees R. V. Osborne and D. F. King died prior to this meeting, and Dr. John Sweeney, J. B. Taylor, J. B. Hill and J. B. Fagge were absent from said meeting; all living trustees were duly notified according to the provisions of the charter of said meeting and also according to the provisions of said charter five trustees present constitute a quorum for all business meetings; at said meeting a deed of trust was authorized to be executed to the executors of the estate of D. F. King, deceased, to secure an indebtedness due the said D. F. King by the Leaksville-Spray Institute, and thereafter, on 2 January, 1924, pursuant to a resolution passed at said meeting which was called and held as hereinbefore referred to, a deed of trust, in the sum of $36,587.89 was executed in the name of the corporation and signed by T. G. Taylor, president, and J. B. Taylor, secretary, with the corporate seal affixed, said deed of trust to be due one year from date; thereafter on 30 June, 1930, a sale was held under the said deed of trust and at said sale T. H. Barker and L. A. Martin became the last and highest bidders for said property, their bid being twenty thousand dollars ($20,000), and the said plaintiffs now hold a title to the property under conveyance made by B. E. Ivie, trustee, in the deed of trust hereinbefore referred to; at the time the property was conveyed to the said institution same was conveyed in three tracts, said conveyances were made to Dr. John Sweeney, D. F. King, Dr. Thos. G. Taylor and others, trustees of Leaksville-Spray Institute, and not made direct to the corporation. Some time after the plaintiffs received their title from B. E. Ivie, trustee as aforesaid, the said plaintiffs obtained a conveyance duly signed by A. E. Millner, J. B. Fagge, J. B. Hill, B. F. Ivie, J. P. Wilson and Dr. T. G. Taylor, trustees of Leaksville-Spray Institute, who were all of the trustees living at the time said conveyance was made by them to the plaintiffs and the plaintiffs now hold title to said property as purchasers at the foreclosure sale under a deed of conveyance made direct to them from the trustees of Leaksville-Spray Institute and have tendered to the defendant a deed to said property according to the terms of their contract to the defendant, which deed the defendant refuses to accept and say that the plaintiffs do not have a good title to the property hereinbefore mentioned for the reason that the trustees who were originally named in the charter hereinbefore referred to, were, in fact, not trustees at the time the meeting was held as hereinbefore referred to, nor when the deed of trust was executed to B. E. Ivie, trustee, and the deed of conveyance which was thereafter executed to the plaintiffs, and were without power and authority to act as trustees for the reason that their term of office had expired according to the provisions of the charter.

The deed herein referred to, which was executed by all of the living trustees of the Leaksville-Spray Institute, was executed pursuant to a resolution passed at a meeting of the incorporators, when and where a majority of the said incorporators were present and voted in favor of said resolution and all living incorporators having been duly notified of said meeting.

Upon the foregoing facts it was adjudged that the defendant be required to perform its contract, accept the deed tendered it by the plaintiffs, and to pay the purchase price and the costs of the action. The defendant excepted and appealed.

J. Hampton Price for appellant.
Allan D. Ivie, Jr., for appellees.

ADAMS, J. The land in question was conveyed to trustees of the Leaksville-Spray Institute, which is a corporation. It was provided in section 4 of the charter that the first four trustees named in section 3 should hold office until the annual meeting of the incorporators in 1906; the second four until said meeting in 1907; the third four until said meeting in 1908; and that their successors should be elected for a term of three years from the date of their election. There is no provision in the charter that the trustees shall hold office until their successors are elected and qualified, and no one has been elected to succeed any of the trustees originally named in the charter. Private Laws 1905, ch. 185; Private Laws 1907, ch. 104. As said in the judgment, the only questions for decision are whether the trustees first appointed continued in office by virtue of their original appointment and whether they could authorize the execution of the deed of trust and make a conveyance to the plaintiffs.

With respect to tenure of office the general rule is that the failure of a corporate body to elect officers or directors does not end the terms of those previously elected. *S. v. Guertin,* 130 A. S. R., 610; *Trustees of Vernon Soc. v. Hills,* 16 A. D., 429; *Treasurer of State v. Mann,* 80 A. D., 688; *Quitman Oil Co. v. Peacock,* 81 S. E. (Ga.), 908. In the present case the trustees continued without objection to perform the duties imposed upon them, and apparently there was no desire on the part of the corporation to displace them by the election of others. No one except the corporation could be heard to complain, and the corporation not only did not complain, but seemed to sanction their continuance in office.

The charter authorized the trustees to hold real and personal property for the corporation; the trustees authorized the execution of the deed of trust and the conveyance to the plaintiffs of the land in controversy. When these three tracts were purchased they were conveyed, not to the corporation *eo nomine,* but to the trustees. All the living trustees, holding the legal title, conveyed the land to the plaintiffs. The corporation duly executed to B. E. Ivie, trustee, the deed of trust under which the property was sold by the trustees and purchased by the plaintiffs. As was said in *Burns v. McGregor,* 90 N. C., 222, it would contravene the plainest principles of justice to allow the corporation to get the benefit of the money secured by the deed of trust and then repudiate its act on the ground of its invalidity. But the corporation does not repudiate its conveyance. Nor do the trustees of Leaksville-Spray Institute undertake to repudiate theirs. The conveyances executed by these parties respectively conveyed to the plaintiffs the legal title and the beneficial or equitable interest in the property in suit. Neither the corporation nor the trustees can now claim any interest in it.

The plaintiffs, therefore, can convey an indefeasible title and the defendant is bound by its contract to accept the deed tendered it by the plaintiffs, and to pay the price agreed for the purchase. Judgment

Affirmed.

D. F. BUTNER v. ATLANTIC & YADKIN RAILWAY COMPANY.

(Filed 12 November, 1930.)

1. **Railroads D b—Granting of nonsuit on ground that contributory negligence of plaintiff barred recovery held error in this case.**

Where the evidence in an action for damages against a railroad company tends to show that the plaintiff, upon approaching the defendant's grade crossing with a State highway in an incorporated town, brought his automobile practically to a stop, and looked and listened for an approaching train, that fog prevented him from seeing further than the length of his car, but there was nothing to prevent his hearing any warning of an approaching train, and that, seeing and hearing nothing, he drove upon the tracks and was struck and injured by the defendant's train which approached the crossing without giving any warning by bell or whistle, the evidence failing to disclose a situation in which the plaintiff would be required to get out of his car and make further investigation before going upon the tracks: *Held,* the question of the plaintiff's contributory negligence should have been submitted to the jury under the appropriate issue, and the granting of the defendant's motion as of nonsuit was error.

2. **Negligence C d—Burden of proving contributory negligence is on defendant.**

In an action to recover damages for an alleged negligent personal injury the burden is upon the defendant to prove contributory negligence when relied upon by him. C. S., 523.

3. **Negligence D c—Question of contributory negligence is ordinarily for the jury.**

Ordinarily, the question of whether the plaintiff is guilty of contributory negligence is to be determined by the jury, and it is only when a clear case of contributory negligence has been made out by the evidence that defendant's motion as of nonsuit on that ground should be allowed.

APPEAL by plaintiff from *Stack, J.,* at September Term, 1930, of FORSYTH. Reversed.

This is an action to recover damages for personal injuries sustained by plaintiff, and caused, as alleged in his complaint, by the negligence of the defendant in the operation of its train as it approached a public crossing. Defendant denies that it was negligent as alleged, and pleads in bar of plaintiff's recovery, his contributory negligence.

Plaintiff was injured when the automobile which he was driving was struck by defendant's train on a public crossing. His injuries were serious and permanent.

There was evidence tending to show that as defendant's train approached the crossing at a rate of speed of from 30 to 35 miles per hour, no whistle was blown, or bell rung, or other signal given, warning plaintiff of its approach. There was no watchman or gate at the crossing, which is within the corporate limits of the town of King, in Forsyth County, at a distance of from two to three hundred yards from the business section of the town. State Highway No. 66, from the town of King, via Rural Hall, towards the city of Winston-Salem, passes over defendant's track, at the crossing. As many as 1,500 automobiles pass over the crossing daily. On 7 December, 1927, plaintiff driving an automobile from the town of King and on his way to the city of Winston-Salem, approached said crossing.

Plaintiff testified that as he approached the public crossing, and when he was at a distance of about 24 feet from defendant's track, he pushed in his clutch, threw up his hand, and "came to a practical stop." He then looked and listened for a train. As he neither saw nor heard a train on defendant's track, he let out his clutch, and "eased" toward the track. As his automobile went on defendant's track, it was struck by a train, which he had neither seen nor heard. As the result of the collision between the train and his automobile, plaintiff sustained serious and permanent injuries, from which he has suffered damages as alleged in his complaint.

It was a foggy morning. Plaintiff testified that the fog at the crossing was so thick that he could not see the length of his automobile. From the time he slowed down until his automobile was struck by defendant's train, plaintiff did not "cut off" his engine. It continued to run. There was no evidence, however, that during this time the engine was making such noise that plaintiff could not have heard the blowing of a whistle, or the ringing of a bell, or other signal warning him of the approach of the train which struck his automobile on the crossing.

There was other evidence which is not pertinent to the question presented by this appeal.

At the close of the evidence for the plaintiff, defendant moved for judgment dismissing the action as of nonsuit. The motion was allowed and plaintiff excepted.

From judgment dismissing the action as upon nonsuit, plaintiff appealed to the Supreme Court.

J. M. Wells, Jr., and John C. Wallace for plaintiff.
Frank P. Hobgood for defendant.

CONNOR, J. It is not contended by the learned counsel for the appellee in this appeal that there was no evidence at the trial of this action in the Superior Court sufficient to sustain the allegations in the complaint to the effect that plaintiff was injured by the negligence of defendant, as alleged therein. The contention is that the evidence offered by the plaintiff, considered in the light most favorable to him, shows that he contributed to his injuries by his own negligence, and that he is therefore barred of recovery in this action. The principle upon which this contention is made is well settled by this Court. *Harrison v. R. R.,* 194 N. C., 656, 140 S. E., 598. It was applied by the Supreme Court of the United States in *Baltimore & Ohio Railroad Co. v. Goodman,* 72 L. Ed., 167. We do not think, however, that the principle is applicable on this appeal. In an action for the recovery of damages resulting from injuries caused by the negligence of the defendant, where the defendant relies upon the contributory negligence of the plaintiff, as a bar to his recovery, the burden is upon the defendant on the issue involving this defense. It is so provided in this State by statute. C. S., 523. Ordinarily, the question whether plaintiff was guilty of contributory negligence is to be determined by the jury. It is only when a clear case of contributory negligence has been made out by the evidence offered by the plaintiff, that a motion by the defendant for judgment as of nonsuit, on that ground, should be allowed.

In *Plyler v. R. R.,* 185 N. C., 357, 117 S. E., 297, contributory negligence is defined as "such act or omission on the part of the plaintiff, amounting to a want of ordinary care, as concurring and coöperating with the negligence of the defendant becomes the proximate cause of the injury." It is to be determined by existing conditions, and not by hypotheses or contingencies.

In *Holton v. R. R.,* 188 N. C., 277, 124 S. E., 307, it is said: "It is the recognized duty of a person on or approaching a railroad crossing to 'look and listen in both directions for approaching trains if not prevented from doing so by the fault of the railroad company or other circumstances clearing him from blame'; and where, as to persons, other than employees of the company, there has been a breach of this duty clearly concurring as a proximate cause of the injury, recovery therefor is barred. *Plyler v. R. R.,* 185 N. C., 357, 117 S. E., 297; *Davidson v. R. R.,* 171 N. C., 634, 88 S. E., 759; *Coleman v. R. R.,* 153 N. C., 322, 69 S. E., 251; *Trull v. R. R.,* 151 N. C., 545, 66 S. E., 586."

In the instant case, there was evidence tending to show that before he drove his automobile on the crossing, plaintiff both looked and listened for an approaching train. It is true that he knew that because of the fog he could not see beyond the length of his automobile. There was no evidence that there were any conditions surrounding him which prevented him from hearing a whistle, or a bell or other signal. Realizing that because of the fog, he could not safely rely upon his sense of sight, he also listened. When he heard no whistle, or bell, or other signal, he assumed that there was no train approaching the crossing, and therefore that he could safely drive over defendant's tracks. Plaintiff drove his automobile from a place of safety to a place of danger only after he had both looked and listened. The evidence does not show a situation in which plaintiff was required to do more than look and listen. The situation, as shown by the evidence, was not such as to require plaintiff as a prudent man to get out of his automobile and make further investigation before exercising his right, under the law of this State, to use its highways, even where they cross a railroad track.

Whether or not plaintiff's conduct was that of a prudent man, is a question which, upon the evidence, he had a right to have determined by a jury. There was error in the judgment dismissing his action. The judgment is

Reversed.

STATE v. PAUL TART.

(Filed 12 November, 1930.)

1. **Criminal Law L e—Finding by trial court that defendant was not prejudiced by fact that juror was related to prosecutrix is not binding on appeal.**

   Where a defendant has been convicted of having carnal knowledge of a girl under sixteen years of age, and it appears from the judge's finding of fact upon defendant's motion to set the verdict aside, that a juror serving on the case was within the 9th degree of relationship to the prosecuting witness, but failed to set aside the verdict on his finding that the juror was not prejudiced, the latter finding is regarded as a conclusion of law rather than one of fact, and is not binding on the Supreme Court upon appeal.

2. **Criminal Law J b—Where juror is related to prosecutrix within 9th degree and defendant has been misled by him, the verdict should be set aside.**

   Where the trial judge refuses to set aside a verdict for relationship of a juror with the prosecuting witness in a criminal case upon his finding that the trial had been fair, and on the defendant's appeal there is no finding as to whether the defendant's counsel was misled by the juror's failure, upon questioning, to disclose this fact, the case will be remanded to the end that the court find whether the defendant's counsel was misled, and upon an affirmative finding the verdict should be set aside.

STACY, C. J., dissents.

CRIMINAL ACTION, before *Lyon, Emergency Judge,* at March Term, 1930, of HARNETT.

The defendant was indicted for carnal knowledge of a girl under sixteen years of age.

The prosecuting witness testified that the defendant had intercourse with her the first time he came to see her and within a few minutes after he arrived. Six witnesses testified that the character of the prosecuting witness was good. Four young men testified that they had had intercourse with her, and four others testified that they had seen others do so, and eleven witnesses testified that her character was bad.

The jury returned a verdict of guilty, and upon the verdict the defendant was sentenced to serve not less than three nor more than five years in the penitentiary.

The record shows the following entry: "During said term it was discovered by the defendant that one of the jurors was related to the prosecuting witness within the degree prohibited, and defendant made motion to set the verdict aside on this ground, which motion was continued to be heard 31 March, 1930, at which time, upon investigation, the court found as follows: 1. That one of the jurors, to wit, W. H. Patterson, who was sworn and empaneled to try the above case, was related to the prosecutrix within the seventh degree. 2. That the following question was asked the jury by the defense counsel: "If there is any member of the jury related to the prosecutrix by blood or marriage, please let that fact be known and excuse himself"—to which juror Patterson made no reply. 3. That the said W. H. Patterson says he did not recognize the relationship at the time he was chosen as juror, and that is why he did not disclose this fact, but admits he discovered the same before any evidence was introduced. 4. That the said W. H. Patterson, after discovering the relationship, and before the evidence was introduced, wanted to disclose this fact to the court, but upon advice not to do so, he continued to serve upon the jury, knowing his relationship to the prosecutrix. 5. The court further finds that the defendant was not prejudiced by said juror serving."

From judgment rendered the defendant appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Young & Young for defendant.

BROGDEN, J. The sole question presented by the record is whether the judge should have set aside the verdict by reason of the fact that one of the jurors was related to the prosecuting witness within the seventh degree?

It has been generally held that "the finding of fact by the presiding judge, who is far better acquainted with the surroundings than we can possibly be, is conclusive, and we cannot look into the affidavits, whether one or more, to reverse such finding." *S. v. Crane,* 110 N. C., 530; *Radford v. Young,* 194 N. C., 747; *S. v. Adkins,* 194 N. C., 749.

Notwithstanding, it is also true that the law has always regarded relationship by blood or marriage within the ninth degree as a disqualification for jury service. *S. v. Potts,* 100 N. C., 457, 6 S. E., 657; McIntosh on North Carolina Practice and Procedure, sec. 655(6).

Indeed, the prevailing idea of law for more than a century has been that a person accused of crime is entitled to a trial by a fair and impartial jury. It is known of all men and has been known from time primeval that the call of blood is always powerful and potent, and ordinarily and usually irresistible. The urge to yield to such call in time of attack is not a mark of frailty but a badge of strength. Wherefore, the law, not only as a science of reason, but in the exercise of sound common sense, has invariably recognized blood relationship as the universal producer and creator of bias and favor in the trial of causes. In the case at bar, the trial judge finds that the bias of blood against the defendant existed in one of the jurors, but it is suggested that the juror was related to the prosecuting witness and that a prosecuting witness is not a "party" in a technical sense, in a criminal action. Hence, it is reasoned from such premise that the juror was competent. The fallacy of such reasoning lies in the fact that the defendant was the one on trial and the law guaranteed to him an impartial jury. Therefore, he was the party against whom the bias might silently and secretly work. In *S. v. Brady,* 107 N. C., 822, it was held that a prosecuting witness was not "a party" to a criminal action. Technically this is true, but the question at issue in the *Brady case* was not even similar to the question now under consideration. Furthermore, the judge found that the juror knew of the relationship and was desirous of disclosing the fact to the court before evidence was introduced and was advised not to do so. It does not appear who gave such advice, but it is certain that the matter was discussed. The judge also found that the attorney for the defendant requested information in passing upon the jury as to whether any juror was related to the prosecuting witness, and that the juror Patterson made no reply or disclosure. Thus, the attorney, through no fault of his own, was lulled into a sense of security. A somewhat similar situation arose in the case of *Hinton v. Hinton,* 196 N. C., 341, where counsel was misled by the statements of the juror. The Court found as a fact that counsel was so misled and set the verdict aside. The ruling was approved by this Court. So, in the case at bar the defendant is entitled, under the facts disclosed, to have the court find as a fact whether the defendant or his counsel was misled and whether he would have challenged the juror had the real facts been disclosed. It is true that the trial judge found that the defendant was not prejudiced "by said juror serving," but such finding in the light of the facts is rather a conclusion of law than a finding of fact. The prosecuting witness, the kinswoman of the juror, was subjected to bitter and relentless attack and much evidence offered to sustain the attack so made. Thus the stage was perfectly set to arouse in the juror the elemental passion, common to our human nature. Whether he actually yielded thereto is not the point. The point is, that the potential bias, which the law condemns was present and the defendant, through no fault of his own, was prevented from discovering its existence.

The cause is remanded to the Superior Court for a finding as to whether the defendant or his counsel was misled, and if the judge shall find that the defendant or his counsel was misled, the judgment should be set aside; otherwise to remain in full force and effect.

Remanded.

STACY, C. J., dissents.

E. A. RASBERRY v. S. H. HICKS, B. M. MERCER, M. O. GRIMSLEY, COMPOSING AND BEING NOW THE BOARD OF ELECTIONS OF THE COUNTY OF GREENE, STATE OF NORTH CAROLINA, AND N. U. MEWBORN.

(Filed 12 November, 1930.)

Appeal and Error A e—Where question presented for review has become moot or academic the appeal will be dismissed.

Where the question involved on appeal to the Supreme Court is the choice of a party of one of two candidates in its primary, after the general election has been held the question becomes abstract or academic and the appeal will be dismissed.

APPEAL by plaintiff from *Nunn, J.,* heard at Chambers in the city of New Bern, 17 September, 1930. From GREENE. Appeal dismissed.

This is an action brought by plaintiff against defendants, plaintiff claiming that there were irregularities in a primary election and demanding certain relief.

The matter was heard before Nunn, J., who rendered the following judgment: "This cause coming on to be heard and being heard before the undersigned judge at Chambers in the city of New Bern, this 27 September, 1930, upon the complaint and affidavits of the plaintiff and the defendants having demurred to his jurisdiction of the court, to hear and determine the questions in controversy or make any order in the matter, after argument of counsel for the plaintiff and defendants: It is considered by the court and ordered and adjudged that the court is without jurisdiction and the case is therefore dismissed and this plaintiff is taxed with the costs." To the foregoing judgment plaintiff excepted, assigned error and appealed to the Supreme Court.

On the face of the returns plaintiff received 1,149 votes and defendant 1,181, a majority of 32 votes for the defendant Mewborn. On 3 October, 1930, plaintiff filed an amended complaint and contended that certain votes cast were illegal and should not have been counted by the defendant board of elections, and setting forth, among other things: "A primary election for the Democratic nomination for the office of sheriff of the county of Greene was duly held in Greene County, N. C., on 7 June, 1930, in which primary election the plaintiff, E. A. Rasberry, and the defendant, N. U. Mewborn, were two of the candidates for the Democratic nomination to the office of sheriff, and that in said primary election as declared and announced by the said board of elections of the said county, the defendant Mewborn received the second highest vote, and thereafter made demand upon the said county board of elections for a second primary to determine the choice of the Democratic voters of the said county for the office of sheriff, and that in said second primary the two candidates were the plaintiff and the defendant Mewborn, and the said second primary was duly called by the said defendant board of elections of said county and duly held on 5 July, 1930, as prescribed by law. . . . That the plaintiff avers upon information and belief and upon the facts stated herein, that he was the choice of the majority of the duly qualified and registered voters who were entitled to vote, and did vote in the said election on 5 July, 1930, at the several precincts in the said county of Greene for the Democratic nomination for the office of sheriff of said county, and but for the unlawful and wrongful vote and irregularities in this complaint stated, the said plaintiff would have been declared and published as the Democratic nominee for the office of sheriff of said county, even though the said defendant board of elections certified that the defendant Mewborn had received a majority of 34 (32) votes over this plaintiff."

The board of elections, answering, among other things said: "That the plaintiff and the defendant, N. U. Mewborn, were both represented by counsel at the various meetings and adjournments held. These defendants being advised that under the laws of the State of North Carolina their only duty, power and authority in the premises was to receive and tabulate the returns made by the judges and registrars of the various precincts in Greene County with reference to the candidates before the primary, so as to show the total number of votes cast for each candidate of each political party for each office, and when thus compiled, to make out returns in duplicate and file one copy with the clerk of the Superior Court and retain one copy, and to publish and declare the results. . . . That the jurisdiction to hear and determine the facts and issues set forth in the complaint herein is vested in the various registrars and judges of elections in the several precincts of Greene County, and their jurisdiction is exclusive, and that no provision is made by law for an appeal to these defendants or to this Court, and these defendants are advised, informed and believe that this Court is without jurisdiction to review the actions of the various registrars and judges of elections, or to hear and determine this action.

The defendant, Mewborn, denied that there were irregularities as charged by plaintiff, and among other things, said: "This defendant avers that the returns made by said board of elections were true and correct returns as received and tabulated by them, and they declared the result of said primary in accordance therewith. . . . That the plaintiff fails to allege that he would be the nominee for sheriff if the votes of all persons whom he alleges were improperly received were withdrawn, and disregarded, and that the result of the election would thereby be changed, and that on account of such failure, the plaintiff has stated no cause of action."

Plaintiff's complaint was verified 3 October, 1930. The answer of the board of elections of Greene County was verified 6 October, 1930. Defendant Mewborn's answer was verified 7 October, 1930. This action was submitted to this Court under Rule 10, on Friday, 24 October, 1930. The general election was held on 4 November, 1930.

J. J. Hatch, J. Faison Thomson and J. S. Manning for plaintiff.
A. J. Albritton, Connor & Hill and F. E. Wallace for defendant.

PER CURIAM. It will be readily seen if the judgment of Nunn, J., should be reversed by this Court, it could not benefit plaintiff, as the election has already been held on 4 November, 1930.

In *Glenn v. Culbreth,* 197 N. C., at p. 678, citing numerous authorities, it is said: "The law provided for the regular city election on the first Monday in May, 1929. It was conceded in the oral argument that the election was held and the defendants, commissioners, were elected. The injury complained of has thus become accomplished and completed. Hence, the appeal presents, in its final analysis, only a moot or abstract question. The uniform rule adopted by this Court is to the general effect that such questions will not be considered."

"The appeal therefore raises a question which is abstract or academic." *Board of Education v. Commissioners of Johnston,* 198 N. C., 430. The Court will take judicial notice of the fact that the general election was held on 4 November, 1930.

For the reasons given, the appeal is
Dismissed.

G. E. CARTER AND WIFE, EFFIE CARTER, v. J. N. BRYANT.

(Filed 12 November, 1930.)

Appeal and Error E d—Statement of case on appeal will be taken as filed and served by appellant and will stand if appellee fails to file exceptions.

It is appellant's duty, not that of the clerk of the trial court, to make out a complete statement of his case on appeal, and the latter is not required to fill in blank spaces left and referred to for copying in exhibits introduced upon the trial, etc., and when the clerk certifies up the case with the blanks left therein and to the correctness of the information contained in the pages afterwards supplied by some one, to which the appellee serves no exceptions or countercase, the record so sent up and the appellant's case becomes the case on appeal, and the judgment of the Superior Court will be confirmed if no error is made to appear either in the record proper or the "case" so certified. C. S., 643.

APPEAL by plaintiffs from *McElroy, J.,* at February Civil Term, 1930, of DAVIDSON.

Civil action (1) for specific performance of written contract to purchase land, lumber plant, etc.; (2) to recover damages for alleged breach of said contract; and (3) to recover value of certain lumber sold and delivered to the defendant. The defendant denied liability and set up counterclaim for alleged breach of contract on the part of the plaintiffs.

From a judgment of nonsuit on the first and second cause of action, and order continuing the third cause and defendant's counterclaim for future determination, the plaintiffs appeal, assigning errors.

Brittain & Brittain and Phillips & Bower for plaintiffs.
Bryan & Campbell and H. R. Kyser for defendant.

STACY, C. J. From the judgment and order entered at the February Term, 1930, Davidson Superior Court, the plaintiffs gave notice of appeal to the Supreme Court, and were allowed forty-five days to make out and serve statement of case on appeal, with thirty days thereafter given to the defendant to prepare and file exceptions or countercase.

The plaintiffs' statement of case, consisting of 29 typewritten pages, throughout which appear at least 45 notations, "Clerk will here copy deed," or "Clerk will here copy plaintiff's exhibit No. ....," etc., was served on defendant's counsel 2 April, 1930. No deeds or exhibits, which the clerk was directed to copy and insert therein, accompanied this statement. Deeming said statement, as made out and served, insufficient to show error on the part of the trial court, counsel for defendant notified the clerk of the Superior Court of Davidson County, 22 May, 1930, that no exceptions or countercase would be filed, and that the plaintiffs' statement of case on appeal, exactly as made out and served, without alteration, amendment or insertion of deeds and exhibits, would, therefore, become the statement of case on appeal by operation of law. *S. v. Price,* 110 N. C., 599, 15 S. E., 116.

Thereafter, the deeds and exhibits referred to in plaintiffs' statement of case on appeal, as made out and served, were copied by some one and presented to the clerk for incorporation into said statement. The clerk did not insert these deeds and exhibits in the statement of case on appeal, but certifies that the "first 47 sheets contain the case on appeal . . . and the succeeding 73 sheets contain true and correct copies of the exhibits referred to by notations in said case on appeal."

On 14 October, 1930, before the call of the docket from the district to which the case belongs, the defendant lodged a motion to dismiss the appeal for apparent irregularities on the face of the record. This motion was denied. *Waller v. Dudley,* 193 N. C., 749, 138 S. E., 128.

It is provided by C. S., 643, that if appellant's statement of case on appeal is not returned by appellee with objections within the time prescribed, it shall be deemed approved. In the instant case, therefore, the statement made out and served by the plaintiffs became the statement of case on appeal. *Barber v. Justice,* 138 N. C., 20, 50 S. E., 445.

It is no part of the clerk's duty to insert exhibits or fill up blank spaces in such statements. *Sloan v. Assurance Society,* 169 N. C., 257, 85 S. E., 216. The clerk makes up the record proper, but not the case on appeal. C. S., 645. It is the duty of appellant to prepare a concise statement of the case, just as he thinks it should be presented to the Supreme Court, and serve the same on appellee within the time stipulated. C. S., 643. If approved by appellee, the case, as made out and served by appellant, is to be filed with the clerk as a part of the record, and if not returned with objections within the time specified, "it shall be deemed approved." *S. v. Humphrey,* 186 N. C., 533, 120 S. E., 85.

There is, then, a statement of case on appeal. But we agree with the defendant that no error appears on the face of the record proper, or in the case on appeal, which would justify a reversal of the judgment of nonsuit. Hence, it will be affirmed. *Mfg. Co. v. Simmons,* 97 N. C., 89, 1 S. E., 923.

Affirmed.

BYRD GRIFFIN ET AL. v. LULA M. DOGGETT ET AL.

(Filed 12 November, 1930.)

Wills E b—Devise in this case created fee upon limitation with reversion to children of devisee by executory devise upon happening of event.

The testator, knowing the children of his daughter were illegitimate, devised to his daughter after the life time of his wife, his lands to her if she remained unmarried but should she marry to her two illegitimate children the proceeds of sale of the land for equal division between them: *Held,* the remainder to the testator's said two grandchildren is construed to ascertain the testator's benevolent intent to take effect as an executory devise as a limitation after the marriage of the daughter, and not void as being upon a condition subsequent in general restraint of marriage, requiring no reëntry or assertion of claim to defeat the prior estate. *Gard v. Mason,* 169 N. C., 507, cited as not conflicting.

APPEAL by defendants from *Stack, J.,* at May Term, 1930, of GUILFORD.

Civil action in ejectment, heard upon agreed statement of facts.

From a judgment in favor of plaintiffs the defendants appeal, assigning error.

Hunter K. Penn and D. F. Mayberry for plaintiffs.
John S. Michaux and Frazier & Frazier for defendants.

STACY, C. J. The case presents for construction the following clause in the will of W. H. Brookbank:

"The land I give and bequeath after the death of my wife to my daughter, Lula M. Brookbank, in fee simple. Provided, she does not marry and in case she should marry then my will is that said lands shall be sold and the proceeds of such sale shall be equally divided between my following grandchildren, Nellie Brookbank and Edna Brookbank, who are the children of Lula M. Brookbank."

Preceding this devise, the testator gave his wife a life estate in all his property. He died 3 February, 1919. His daughter, Lula M. Brookbank, married D. C. Doggett 11 April, 1919. His widow died 7 December, 1929. The plaintiffs are the grandchildren mentioned in the will, and were known to the testator to be the illegitimate children of Lula M. Brookbank.

The case turns on whether the estate in remainder, devised to Lula M. Brookbank, is to be regarded as one upon limitation, determinable upon her marriage, or as one upon condition *in terrorem,* void because in general restraint of marriage. We think the trial court correctly held, under the decision in *In re Miller,* 159 N. C., 123, 74 S. E., 888, that it is an estate upon limitation, rather than one upon a void condition subsequent.

It was not the purpose of the testator to prevent the marriage of his daughter, but rather to aid her during celibacy, and as soon as she was in position to be supported by her husband, it was his desire that the property should go to her illegitimate children. This imputes to the testator a magnanimous spirit, rather than one which the law condemns. Generous impulses of mind and heart ought not to be thwarted by an awkward use of words, and will not be, when such lawful intent of the testator is clearly discernible from the writing which he leaves. *Ellington v. Trust Co.,* 196 N. C., 755, 147 S. E., 286.

Even though the words used may, in strictness, be those ordinarily employed to denote a condition subsequent, nevertheless, if followed by a limitation over to a third person, which vests without the necessity of entry or claim, rather than by provision for reverter, which requires reentry or assertion of claim to defeat the prior estate, the courts are inclined to construe such a gift or devise as a limitation and not a condition. Mordecai's Law Lectures, 522; 4 Kent's Com., 125-126.

The will then, as we interpret it, creates a life estate in the wife, with remainder upon limitation to the testator's daughter, followed by an executory devise to his named grandchildren. *In re Miller, supra.*

The decision in *Gard v. Mason,* 169 N. C., 507, 86 S. E., 302, strongly relied upon by appellants, is not at variance with this position.

There is no difference in principle, so far as the vesting of the right is concerned, between a direction to divide the property and a direction to sell the property and divide the proceeds. *Witty v. Witty,* 184 N. C., 375, 114 S. E., 482.

Affirmed.

W. B. ELLIS v. W. B. ELLIS, JR., EXECUTOR.

(Filed 12 November, 1930.)

Appeal and Error E a—The pleadings are a part of the record proper and when they do not appear therein the appeal will be dismissed.

Upon an appeal from the denying of a motion of change of venue only on one issue as to insanity, and the answer of the defendant giving rise to the motion not appearing of record and no brief of plaintiff filed, and it further appearing that the appeal is without merit, it will be dismissed. *Waters v. Waters, ante,* 667.

APPEAL by plaintiff from *Stack, J.,* at September Term, 1930, of FORSYTH.

Civil action to set aside a consent judgment—the same case that was here at the last term, 198 N. C., 767.

The present appeal is from the court's refusal to transfer the cause to Davie County for trial, "in so far as it involves the matter of the sanity of the plaintiff."

The record discloses that the motion for change of venue, on the issue of plaintiff's alleged insanity, was originally made and denied in the Superior Court of Forsyth, 1 June, 1928. It was renewed at the December Term, 1928, before MacRae, Special Judge, who first entered an order allowing the motion, but struck it out later in the term, reciting that the order of partial removal "was improvidently issued." The plaintiff again renewed his motion at the September Term, 1930, before Stack, J., who denied it on two grounds: First, because on a preceding day of the term, "upon the request of plaintiff and with the consent of counsel for the defendants," the case had been continued for the term; and, second, because the same motion "had been heard and refused by a former Superior Court."

Plaintiff appeals, assigning error.

No counsel for plaintiff.
Manly, Hendren & Womble for defendant.

STACY, C. J. The answer of the defendant, which gave rise to the motion for change of venue, is not in the record, and no brief has been filed by the plaintiff. Besides, the appeal is without merit. It will be dismissed. *Waters v. Waters, ante,* 667.

Appeal dismissed.

WINCHESTER-SIMMONS COMPANY AND H. P. WHITEHURST, RECEIVER OF L. H. CUTLER, SR., v. L. H. CUTLER, SR., AND MISS LAURA A. ROBERTS.

(Filed 12 November, 1930.)

1. **Execution B a—Land held by husband and wife by entireties is not subject to execution on several judgments against either.**

   Lands devised or conveyed to husband and wife as such carries to them the title by entirety and is not subject to execution of a judgment against either of them severally during their joint lives, the principle of *jus accrescendi* applying.

2. **Husband and Wife G a—Deed by husband and wife to land held by entirety carries title to grantee free from judgment lien against one of them.**

   In the absence of fraud which would vitiate their deed a conveyance of land executed and delivered by husband and wife to lands held by them in entirety conveys the entire title to the lands to their grantee not subject to execution under a judgment against only one of them.

3. **Fraudulent Conveyances A c—Creditor of husband may not set aside deed of husband and wife, the wife and grantee having no fraudulent intent.**

   Where a husband induces his wife to join in a sufficient deed to their daughter conveying lands held by them in entirety with the purpose unknown to the wife and their grantee of defeating the levy under a judgment of his creditor, his judgment creditor then having no right of execution against the land cannot be defrauded of a right, and the wife and their grantee being free from fraudulent intent, the conveyance is not subject to be defeated on the ground that it was executed in fraud of the rights of his personal judgment creditor.

4. **Husband and Wife G a—Husband may convey his interest in land held by entireties without imputation of fraud as against his judgment creditor.**

   During their joint lives the husband has only a possibility of acquiring the full title to lands held by them in entireties, and such interest is not subject to a lien by virtue of a judgment against him alone, and he may convey this interest that he has without imputation of fraud against his judgment creditor.

5. **Fraudulent Conveyances A c—In this case held: there was no allegation that grantee took title impressed with trust, and Davis v. Bass does not apply.**

Where it appears in the complaint in an action to subject lands to a levy under a judgment against the husband alone that the husband and wife had held the lands by entireties and had conveyed a good and sufficient fee-simple title to their granddaughter by their joint conveyance, there is no sufficient allegation that their grantee took the title impressed by a trust. *Davis v. Bass*, 188 N. C., 200, cited and distinguished.

APPEAL by plaintiffs from *Barnhill, J.*, at May Term, 1930, of CRAVEN. Affirmed.

This action was heard on defendant's demurrer to the complaint filed therein by the plaintiffs. The facts alleged in the complaint and admitted by the demurrer are as follows:

The plaintiff, Winchester-Simmons Company, is a judgment creditor of the defendant, L. H. Cutler, Sr. Its judgment for the sum of $2,842.08, with interest and cost, was duly docketed in the office of the clerk of the Superior Court of Craven County on 21 September, 1925. An execution issued on said judgment on 1 July, 1927, was returned by the sheriff of Craven County unsatisfied.

The plaintiff, H. P. Whitehurst, was duly appointed receiver of the defendant, L. H. Cutler, Sr., in certain proceedings instituted by the plaintiff, Winchester-Simmons Company, on 1 August, 1927, supplemental to said execution. No payment has been made on said judgment by the defendant, L. H. Cutler, Sr., or by the said receiver out of any property which has come into his hands. The full amount of said judgment, with interest and cost, is now due and unpaid.

During the month of October, 1926, Mrs. Sarah E. Wadsworth died in Craven County, having first made and published her last will and testament, which has since been duly probated and recorded. By said last will and testament the testatrix gave and devised to the defendant, L. H. Cutler, Sr., and his wife, Mrs. Laura D. Cutler, the lot of land described in the complaint. The said lot of land is situate in the city of New Bern, in Craven County. By said devise, the said L. H. Cutler, Sr., and his wife, Mrs. Laura D. Cutler, took and held an estate by the entirety in said lot of land.

On 5 June, 1928, the said L. H. Cutler, Sr., and his wife, Mrs. Laura D. Cutler, conveyed the lot of land devised to them, as tenants by the entirety, to the defendant, Miss Laura A. Roberts, their granddaughter. The deed by which said lot of land was conveyed was executed by both L. H. Cutler, Sr., and Mrs. Laura D. Cutler. They conveyed said lot of land without receiving therefor any valuable consideration from Miss Laura A. Roberts. The consideration recited in said deed is, "ten dollars and other valuable considerations."

At the date of said deed the plaintiffs were prosecuting certain actions and proceedings to subject to the payment of the judgment owned by the plaintiff, Winchester-Simmons Company, and against the defendant, L. H. Cutler, Sr., the interest of said defendant in certain bonds which had been given and bequeathed by Mrs. Sarah E. Wadsworth, by her last will and testament, to said defendant and his wife, Mrs. Laura D. Cutler. The said L. H. Cutler, Sr., was contesting the right of plaintiffs to recover in said actions and proceedings. He was advised that if he survived his wife, who was then in bad health, he would become the owner, by virtue of such survivorship, of the lot of land in which he and his said wife then had an estate by the entirety, and that said lot of land would in that event become subject to the lien of the docketed judgment owned by the plaintiff, Winchester-Simmons Company, against him, and to sale under execution for the satisfaction of said judgment.

The purpose of the defendant, L. H. Cutler, Sr., in executing the deed by which said lot of land was conveyed to his granddaughter, the defendant, Miss Laura A. Roberts, and in procuring his wife, Mrs. Laura D. Cutler, to join him in the execution of the same, was to convey the title to said lot of land to his said granddaughter, in order that in the event he should survive his wife, the said granddaughter might hold the title to the said lot of land, and thereby prevent the said judgment from becoming a lien on said lot of land. It was his purpose by said conveyance to defeat the right of the plaintiffs to have said lot of land sold under execution for the satisfaction of said judgment, in the event he should become the owner thereof by survivorship. Neither Mrs. Laura D. Cutler, nor the defendant, Miss Laura A. Roberts, participated or shared with the said L. H. Cutler, Sr., in said purpose. Neither of them knew his purpose in executing said deed, or in procuring his wife to join him in the execution of the same. Since the execution of said deed, Mrs. Laura D. Cutler has died, leaving surviving her husband, the defendant, L. H. Cutler, Sr.

On the foregoing facts alleged in their complaint, plaintiffs demanded judgment that the deed executed by L. H. Cutler, Sr., and his wife, Mrs. Laura D. Cutler, by which the lot of land described in the complaint was conveyed by them to the defendant, Miss Laura A. Roberts, be declared void, as to the plaintiffs, and that said lot of land be subjected to the payment of the judgment now owned by the plaintiff, Winchester-Simmons Company against the defendant, L. H. Cutler, Sr.

The court was of opinion that the facts stated in the complaint are not sufficient to constitute a cause of action on which the plaintiffs are entitled to the relief demanded in this action, and that the demurrer should be sustained.

From judgment in accordance with this opinion, dismissing the action, plaintiffs appealed to the Supreme Court.

Ernest M. Green for plaintiff.
Whitehurst & Barden and Ward & Ward for defendants.

CONNOR, J. In *Davis v. Bass,* 188 N. C., 200, 124 S. E., 566, it is said: "When land is conveyed or devised to a husband and wife as such, they take the estate so conveyed or devised, as tenants by the entirety, and not as joint tenants or tenants in common. *Harrison v. Ray,* 108 N. C., 215. This tenancy by the entirety takes its origin from the common law when husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person. The estate rests upon the doctrine of the unity of person, and, upon the death of one, the whole belongs to the other, not solely by right of survivorship, but also by virtue of the grant which vested the entire estate in each grantee. *Long v. Barnes,* 87 N. C., 329; *Bertles v. Nunan,* 92 N. Y., 152. These two individuals, by virtue of their marital relationship, acquire the entire estate, and each is deemed to be seized of the whole and not of a moiety or an undivided portion thereof. They are seized of the whole, because at common law they were considered but one person; and the estate thus created has never been destroyed or changed by statute in North Carolina. *Freeman v. Belfer,* 173 N. C., 587. It still possesses here the same properties and incidents as at common law. *Bynum v. Wicker,* 141 N. C., 95. The act abolishing survivorship in joint tenancies in fee (C. S., 1735), does not apply to tenancies by entirety. *Motley v. Whitemore,* 19 N. C., 537. A joint estate is distinguished by the four unities of time, title, interest and possession *(Moore v. Trust Co.,* 178 N. C., p. 124); and it has been held that in tenancies by the entirety, a fifth unity is added to the four common-law unities recognized in joint tenancies, to wit, unity of person. *Topping v. Sadler,* 50 N. C., 357."

Two of the properties or incidents of this estate which, in view of changes in the law in conformity with changes in social conditions, has been declared by this Court to be an anomaly, are stated in *Davis v. Bass* as follows:

"4. Lands held by husband and wife as tenants by the entirety are not subject to levy under execution on a judgment rendered against either the husband or the wife alone, nor can the interest of either be thus sold, because the right of survivorship is merely an incident of the estate, and does not constitute a remainder, either vested or contingent; but a judgment rendered against the husband and wife jointly, upon a joint obligation, may be satisfied out of an estate in lands held by them as tenants by the entirety. *Martin v. Lewis,* 187 N. C., 473, 30 C. J., 573."

"14. A sale by husband and wife and a division of the proceeds ends an estate by the entirety. *Moore v. Trust Co.,* 178 N. C., 118."

Because of the nature of the estate, acquired by the defendant, L. H. Cutler, Sr., and his wife in the lot devised to them as tenants by the entirety, by Mrs. Sarah E. Wadsworth, and of the properties and incidents of said estate, the judgment in favor of the plaintiff, Winchester-Simmons Company and against the defendant, L. H. Cutler, Sr., was not a lien on said lot at any time during the joint lives of said L. H. Cutler, Sr., and his wife, Mrs. Laura D. Cutler, nor was said lot subject to sale under execution for the satisfaction of said judgment during said time. In *Bruce v. Nicholson,* 109 N. C., 202, 13 S. E., 790, it is said: "As we have seen, the husband, who is the judgment debtor in this case, had no interest in the land that he could dispose of, nor that was subject to sale under execution or any legal process. A sale would be ineffectual. The possibility that the husband might survive his wife and thus become the sole owner of the property, was not the subject of sale or lien. This did not constitute or create any present estate, legal or equitable, any more than a contingent remainder or any other mere prospective possibility. *Bristol v. Hallyburton,* 93 N. C., 384."

If the deed executed by L. H. Cutler, Sr., and his wife, Mrs. Laura D. Cutler, by which they jointly conveyed the lot of land described in the complaint to the defendant, Miss Laura A. Roberts, is valid, although the defendant, L. H. Cutler, Sr., has survived his wife, he had no interest or estate in said lot of land, at the commencement of this action, to which said judgment could attach as a lien, or which was subject to sale under execution for the satisfaction of said judgment. The lot of land was conveyed by both L. H. Cutler, Sr., and his wife, Laura D. Cutler; each at the date of their deed was seized of the whole estate in said lot, and not of a moiety, or of an undivided portion thereof. *Davis v. Bass, supra.* It is expressly alleged in the complaint that Mrs. Laura D. Cutler did not participate or share with her husband in his purpose by the execution of said deed to hinder, delay and defraud the plaintiffs. She, at least, with the joinder of her husband, had the right to convey said lot of land to her granddaughter. The purpose of her husband, who at the date of the deed had the same interest in the land as she had—no more and no less—not disclosed to her, could not render the deed void as to her.

Nor can it be held on the facts alleged in the complaint that the purpose of L. H. Cutler, Sr., in executing the deed, and thereby joining with his wife in the conveyance of the land, was fraudulent, thus rendering the deed void. In *Teague v. Downs,* 69 N. C., 280, it is said that as creditors of a husband had no right to subject his estate by the curtesy in lands owned by his wife, to the satisfaction of his debts, during the life of the wife, he was at liberty, if so minded, to surrender his estate in said land, and that such surrender could not be held fraudulent as to his creditors. See, also, *Dortch v. Benton,* 98 N. C., 190, 3 S. E., 638, in which it was held that as a debtor's homestead is not subject to sale under execution on a judgment against him, his conveyance of the homestead was not fraudulent as to his creditors, although it was otherwise as to a conveyance of the land subject to the homestead. At the date of the deed from L. H. Cutler, Sr., and his wife, Laura D. Cutler, to their granddaughter, L. H. Cutler, Sr., had no interest in the land conveyed by the deed, present or prospective, which was subject to sale for the satisfaction of the judgment against him, then owned by the plaintiff, Winchester-Simmons Company; he had only a possibility of owning such interest or estate, contingent upon the uncertainty of his surviving his wife. This was not such an interest or estate as could be sold under execution for the satisfaction of the judgment. *Bruce v. Nicholson, supra.* His conveyance of the land, with the joinder of his wife, thus surrendering his right to an estate in the land, upon his survivorship, was not fraudulent as to the plaintiffs.

It does not appear from the allegations of the complaint that the defendant, Miss Laura A. Roberts, took the title to the land conveyed to her, with a trust impressed upon her title, by the terms of the deed, or by parol. It is expressly alleged in the complaint that she did not participate, or share with the defendant, L. H. Cutler, Sr., in the purpose with which it is alleged he executed the deed. The decision of this Court in *Davis v. Bass, supra,* is, therefore, not controlling in the instant case.

We concur in the opinion of the Superior Court that the facts alleged in the complaint are not sufficient to constitute a cause of action on which plaintiffs are entitled to relief in this action. The judgment is

Affirmed.

MARY LOUISE MACRAE AND CHARLES B. MACRAE v. COMMERCE UNION TRUST COMPANY, CHARLES B. MACRAE, JR., AND MARY CARTER MACRAE.

(Filed 12 November, 1930.)

1. **Trusts D a—Laws of North Carolina held to govern power of revocation of trust settlement in this case.**

Where the daughter of a British subject takes property absolutely from the trustees under his will upon her marriage, and marries in North Carolina, executing in this State a deed of settlement in trust, without consideration, for beneficiaries of this State, upon certain contingencies: *Held*, the *lex loci contractu* governing the marriage settlement is that of North Carolina and controlled by the provisions of our statutes as to its revocation. C. S., 996, as amended by Laws of 1929.

2. **Trusts A d—Trust in this case held to be voluntary trust.**

Where a woman receives property without restriction from her father's estate and executes a deed in marriage settlement in trust without consideration, the deed is a voluntary trust in contemplation of C. S., 996, as amended by the Public Laws of 1929.

3. **Trusts D a—In this case held: trust was voluntary and remainder over was contingent, and trustor had the right of revocation under C. S., 996.**

In order to come within our statute governing the revocation of a marriage settlement made in trust, it is required that the trust be voluntary, for the benefit of the trustee or some one *in esse* with a future contingent interest limited to some one not *in esse* or not determinable until the happening of a certain event, and to revoke the deed of trust, if recorded, it is required that the deed of revocation be recorded: and *Held*, where a woman executes a trust deed of settlement upon her marriage for the benefit of her children who may be born of the marriage, depending upon their reaching a certain age, the trust interest subject to be changed by her during her life, after the birth of children, their interests do not *ipso facto* become vested, and she may revoke the trust upon giving a sufficient deed to that effect and in compliance with the statute.

Appeal by defendants from *Sink, Special Judge,* at July Special Term, 1930, of Buncombe.

Civil action to revoke a voluntary trust.

It appears from the complaint:

1. That the *feme* plaintiff, the daughter of an English subject, entitled to receive from the trustees of her father's estate a large amount of personal property, when she arrived at the age of 21 years, or married, duly filed a petition in the English Court of Chancery, asking permission to settle her said property under the provisions of "The Infant's Settlement Act, 1855," upon or in contemplation of her marriage to Charles B. MacRae, of Asheville, North Carolina, which said marriage took place 22 December, 1925, while the said petitioner was still an infant, 19 years of age.

2. That agreeably to the order entered upon said petition, and with the approval of the English Court of Chancery, the plaintiffs herein, on 13 December, 1926, executed to the Commerce Union Trust Company, defendant herein, a "Deed of Settlement," under the terms of which the plaintiffs placed with the said defendant, in trust, all the personal property received by the *feme* plaintiff from her father's estate.

3. That under the terms of the said deed of settlement, the property mentioned therein is to be held by the trustee and the income derived therefrom paid to the *feme* plaintiff during her lifetime, and after her

death, the trustee is directed to pay over the trust fund to such one or more of the *feme* plaintiff's children or remoter issue as she shall by deed or will appoint, and in default of any such appointment, the trustee is directed to turn over the trust fund to such of the *feme* plaintiff's children as being male attain the age of 21 years, or being female attain that age or marry under it. The right to revoke said trust deed is expressly reserved to the *feme* plaintiff, under certain conditions, if and when she attains the age of 30 years. She has not yet reached that age. This action was brought within three years after she attained her majority.

4. That the defendants, Charles B. MacRae, Jr., age 3, and Mary Carter MacRae, age 1, are children of the plaintiffs herein.

5. That the plaintiffs are now desirous of revoking said deed of settlement, and to that end have duly executed a deed of revocation and tendered same to the trustee, but the trustee declines to surrender the trust property as demanded, contending that since the birth of issue to the *feme* plaintiff the said deed of settlement is irrevocable.

From a judgment overruling a demurrer, interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action, and granting the relief sought, the defendants appeal, assigning error.

J. M. Horner, Jr., for plaintiffs.

Alfred S. Barnard for defendant Trust Company.

J. C. Cheesborough, guardian ad litem, for defendants, Charles B. MacRae, Jr., and Mary Carter MacRae.

STACY, C. J. The determinative question is whether the interests created by the limitations in the deed of settlement to the *feme* plaintiff's children or remoter issue are vested or contingent. We think they are contingent.

It is provided by C. S., 996, as amended by chapter 305, Public Laws 1929, *inter alia,* that any grantor, maker or trustor who has heretofore created or may hereafter create a voluntary trust estate in real or personal property for the benefit of himself, or any other person *in esse,* with a future contingent interest to some person or persons not *in esse.* or not determinable until the happening of a future event, may, at any time prior to the happening of the contingency vesting the future estates, revoke the grant of the interest to such person or persons not *in esse,* or not determinable, by a proper instrument to that effect; provided in case the instrument creating such estate has been recorded, the deed of revocation shall likewise be recorded to make it effective.

To bring a case within the terms of this statute, it should appear: First, that the trust is a voluntary one; second, that it was created for the benefit of the trustor, or some person *in esse,* with a future contingent interest limited to some person not *in esse,* or not determinable until the happening of a future event; and, third, that if the instrument creating the trust has been recorded, the deed of revocation has likewise been recorded. *Stanback v. Bank,* 197 N. C., 292, 148 S. E., 313.

It is not seriously questioned but that the trust created by the present deed of settlement is a voluntary one. The *feme* plaintiff was in no way obligated, under her father's will, to keep her share of his estate in trust. Her right to receive it became absolute upon her marriage. The approval of the English Court of Chancery was apparently for the protection of the English trustees. The instrument was executed without consideration.

That the interests of the *feme* plaintiff's children are contingent, rather than vested, will appear, we think, from the following provisions in the trust deed:

"4. After the death of the wife the trustee shall stand possessed of the capital and income of the trust fund upon trust to assign, transfer, pay over and deliver the trust fund to all or such one or more exclusively of the others or other of them of the children or remoter issue of the wife . . . at such age or times . . . as the wife shall, by any deed or deeds revocable or irrevocable or by will or codicil appoint and in default of and subject to any such appointment upon trust to assign, transfer, pay over and deliver the trust fund to all or any of the children or child of the wife . . . . who being male attain the age of twenty-one years or being female attain that age or marry under it and if more than one in equal shares. . . .

"6. The trustee shall after the death of the wife apply the whole or such part as they in their discretion shall think fit of the income of the share in the trust fund to which any child or remoter issue of the wife shall for the time being be entitled in expectancy . . . towards his or her maintenance, education or benefit. . . .

"7. During such suspense of absolute vesting as aforesaid the trustee shall accumulate the surplus (if any) of the income," etc.

It will be observed that the *feme* plaintiff is not limited in the exercise of the power of appointment to her children, but these she may exclude altogether, and name some remoter issue; and should she die without exercising the power of appointment, none of her children could presently take the property under the above limitations.

Therefore, tested by the criterion of present capacity to take effect in possession, should the possession for any cause become vacant, the interests of *feme* plaintiff's children would seem to be contingent rather than vested. *Ziegler v. Love,* 185 N. C., 40, 115 S. E., 887; 23 R. C. L., 502.

The plaintiffs have duly executed a deed of revocation and tendered the same to the trustee.

Thus it would seem, with the trust a voluntary one and the ultimate beneficiaries taking a future contingent interest and the execution of a proper instrument revoking the trust, that the plaintiffs are entitled to the benefit of the statute. *Stanback v. Bank, supra.*

It is further suggested that as the trust agreement was executed in North Carolina, with all those interested therein residents of this State, the rights of the parties are to be determined by the *lex loci contractus* (31 C. J., 1001); and as the feme plaintiff was an infant at the time of the execution of the agreement, under our law, she is at liberty to disaffirm the same. *McCormick v. Crotts,* 198 N. C., 664; *Collins v. Norfleet-Baggs,* 197 N. C., 659, 150 S. E., 177. But with the holding that the instrument in question comes within the purview of C. S., 996, as amended, it seems unnecessary to rely upon this additional circumstance, though it may be advanced in support of the judgment.

Affirmed.

W. E. LEWIS v. BUTTERS LUMBER COMPANY.

(Filed 12 November, 1930.)

1. **Deeds and Conveyances C c—In this case held: timber deed also conveyed permanent right of way over grantor's land for private railroad.**

   Where a deed conveying the right to cut and remove the timber upon land within a period of three years also expressly conveys a right of way in fee simple over the lands described for a permanent railroad that may be constructed by the grantee, its successors and assigns, there is no ambiguity in the language conveying the railroad right of way permitting interpretation by the courts, and where the railroad is thus built within the three-year limit, the grantee is not liable in damages to the grantor for its continued use of the railroad.

2. **Deeds and Conveyances F a—Where there is no negligence in exercise of right to cut timber, grantee is not liable for damage from falling trees.**

   A deed to standing timber upon lands with the right of ingress, egress, etc., for the purpose of cutting and removing the timber conveyed, such right is to be exercised in the ordinary way and by the ordinary methods incident to its reasonable enjoyment does not subject the grantee to the payment of damages caused to the land from stopping ditches and trees falling upon pasture fences when it has not been careless or negligent in the exercise of this right.

APPEALS by both plaintiff and defendant from *Nunn, J.,* at August Term, 1930, of BLADEN. No error in plaintiff's appeal; new trial in defendant's appeal.

Plaintiff is the owner of a tract of land, containing 600 acres, more or less, situate in Bladen County, North Carolina.

On 19 September, 1924, plaintiff, for and in consideration of the sum of $1,000, sold, and by deed executed by himself and his wife, conveyed to the defendant, all the pine, oak, cypress, ash, poplar and gum timber on said land, above the size of ten inches in diameter on the stump, when cut, with certain exceptions set out in said deed, "together with the right and privilege for and during the period of three years from 24 February, 1926, through themselves, their successors, agents and servants, to enter upon said land or any other lands owned by them and to pass and repass over the same, at will, on foot or with teams and conveyances, to cut and remove said timber, and construct and operate any roads, tramways or railroads, houses and tenements, and remove same at will, over and upon said lands as the party of the second part, its successors and assigns may deem necessary for cutting and removing said timber, and to use such trees, underwood, dead and down timber, and dirt on said land as may be needed in the construction and repair of said roads, tramways and railroads, to run and operate its locomotives and to use and operate any railroad that the grantee herein, or their successors or assigns may construct, and to have right of way in fee simple over said land above described, or any other land owned by them, for a permanent railroad that may be constructed by said grantee, its successors or assigns, the said right of way to be located by said party of the second part, its successors and assigns.

"To have and to hold the said timber, as above described, together with the privileges and rights of way herein granted, to party of the second part, its successors and assigns, during the period of time above named."

During the latter part of January, 1928, the defendant entered upon said land, and cut and removed therefrom the timber conveyed to it by plaintiff. Defendant completed the cutting and removal of said timber within about six months from the date on which it began to cut the said timber.

For the purpose of removing said timber when cut, defendant located on said land a right of way on which it constructed a tramway or railroad. It has maintained said tramway or railroad since 24 February, 1929, and continues to operate the same, notwithstanding the three years during which defendant had the right and privilege, under said deed, to enter upon said land, and to cut and remove therefrom the said timber, expired on 24 February, 1929.

Plaintiff alleged in his complaint that while engaged in cutting and removing said timber, defendant wrongfully and unlawfully caused trees and timber standing and growing near certain pasture fences on said land, when cut, to fall upon said fences, thus breaking down and injuring the same, thereby causing plaintiff damage.

Plaintiff further alleged in his complaint that while engaged in cutting and removing said timber, defendant wrongfully and unlawfully caused trees and tree-tops, when cut to fall into and fill up the ditches and drains on said land, thus damming the water in said ditches and drains and injuring said land, thereby causing plaintiff damage.

Plaintiff further alleged in his complaint that while cutting and removing said timber, defendant wrongfully and unlawfully removed lightwood from said land, thereby causing plaintiff damage.

Plaintiff further alleged in his complaint that by the maintenance and operation of the tramway or railroad constructed by the defendant on the right of way located by it on his land, since 24 February, 1929, defendant has wrongfully and unlawfully trespassed on said land, thereby causing plaintiff damage.

Each and all of the allegations of the complaint on which plaintiff demanded judgment that he recover of the defendant in this action, are denied by the defendant in its answer.

The issues arising on the pleadings were answered by the jury as follows:

"1. Was plaintiff's land wrongfully injured by defendant in destroying fences as alleged in the complaint? Answer: Yes.

2. If so, what damage, if any, is plaintiff entitled to recover therefor? Answer: $100.

3. Was plaintiff's land wrongfully injured by defendant in filling ditches and drains, as alleged in the complaint? Answer: Yes.

4. If so, what damage, if any, is plaintiff entitled to recover therefor? Answer: $500.

5. Was plaintiff's land wrongfully injured by defendant in removing lightwood, as alleged in the complaint? Answer: Yes.

6. If so, what damage, if any, is plaintiff entitled to recover therefor? Answer: $50.

7. Has defendant trespassed upon the land in question since 24 February, 1929, by maintaining its tramroad thereon, and operating trains thereover? Answer: No.

8. If so, what damage, if any, is plaintiff entitled to recover therefor? Answer: Nothing."

From judgment on the verdict that plaintiff recover of the defendant the sum of $650, and the costs of the action, both plaintiff and defendant appealed to the Supreme Court.

Britt & Britt and Dye & Clark for plaintiff.
Varser, Lawrence & McIntyre for defendant.

CONNOR, J. The court was of opinion that as a matter of law the plaintiff, upon all the evidence submitted to the jury at the trial of this action, was not entitled to an affirmative answer to the seventh issue, and, therefore, instructed the jury that if they believed all the evidence pertinent to said issue and found the facts to be as testified by all the witnesses, they would answer the seventh issue, "No," and the eighth issue "Nothing." Plaintiff excepted to this instruction, and on his appeal to this Court assigns same as error. The question presented for decision by this assignment of error is whether the deed from the plaintiff to the defendant conveys to defendant a permanent right of way over and across plaintiff's land, to be located by defendant within the period of time during which defendant had the right to enter upon said land, and to cut and remove therefrom the timber conveyed by the deed. This question must be answered in the affirmative on the authority of *Grady v. Tile Co., ante,* 511, 154 S. E., 834, and *Hughes v. R. R.,* 119 N. C., 688, 23 S. E., 717. The language used by the plaintiff in his deed is so plain and his intention so clearly expressed, that there is no room for construction. *Hinton v. Vinson,* 180 N. C., 393, 108 S. E., 897. In *McCain v. Ins. Co.,* 190 N. C., 549, 130 S. E., 186, it is said: "Rules of construction are only aids in interpreting contracts that are either ambiguous or not clearly plain in meaning, either from the terms of the contract itself, or from the facts to which the rules are to be applied." Courts will not and ought not to undertake to construe the language of a deed, when the intention of the grantor is clearly and plainly expressed, as in the deed involved in the instant case. We find no error in plaintiff's appeal. The defendant has the right, by the terms of its deed, to maintain permanently on the right of way over and across plaintiff's land described therein the tramway or railroad which it constructed on said right of way, during the period in which it had the right to locate said right of way.

In his rulings on defendant's objections to evidence offered by plaintiff, and in his instructions to the jury relative to the issues other than the seventh and eighth issues, the trial judge failed, we think, to give effect to the right of defendant, under its deed from the plaintiff, to enter upon plaintiff's land and to cut and remove therefrom the timber conveyed by said deed. Defendant had the right to cut said timber and to remove the same from said land. Such cutting and removal, if done in the usual and ordinary manner and by the usual and ordinary methods, as was necessarily contemplated by the parties when the timber was conveyed by plaintiff to defendant, was not wrongful, although as incidents thereto plaintiff's fences were injured, and his ditches and drains dammed up by trees and tree-tops. These results are not unusual and defendant is not liable in damages to plaintiff if only the usual and ordinary results followed from the exercise by defendant of its rights under its deed. Defendant is liable to plaintiff only if the jury shall find from the evidence that defendant exercised its rights to cut and remove said timber in a negligent manner, or by negligent methods, thus causing plaintiff injuries greater in extent than usually follow the cutting and removal of timber.

There was evidence tending to show that defendant was negligent both in the manner and in the methods which it employed in the exercise of its rights. The evidence was conflicting, at least, as to whether defendant wrongfully removed lightwood from plaintiff's land as alleged in the complaint. There was no error in the refusal of the court to allow defendant's motion for judgment as of nonsuit. For errors, however, both in the admission of evidence and in instructions to the jury, defendant is entitled to a new trial. It is so ordered.

New trial.

FARMVILLE OIL AND FERTILIZER COMPANY, INC., v. MRS. ELLA A. SMITH, W. A. DARDEN, TRUSTEE, AND MRS. NANNIE QUINERLY.

(Filed 12 November, 1930.)

Mortgages E b—Upon purchase with separate estate, wife gets good title to note executed by husband and secured by mortgage executed by them both.

Where the owner of a town lot and farm executes with his wife a first and second mortgage on the town lot to secure, first, his own several notes and, second, their joint note, and the wife purchases with her own money one of the notes secured by the first mortgage and transfers the note to the trustee in a deed of trust on the farm under an agreement that he was to collect the note and apply the proceeds to the satisfaction of the deed of trust: *Held*, the wife acquired by purchase the title to the note secured by the first mortgage, and her transferee acquired the right to collect the same and apply the proceeds under their agreement, and the holder of the second mortgage on the town lot had no right to set off the deficiency at the foreclosure sale of his mortgage against the rights of the wife's transferee.

CIVIL ACTION, before *Small, J.*, at August Term, 1930, of PITT.

David S. Smith owned two tracts of land. The first tract was situated in the town of Greenville, North Carolina, and contained one-half acre, more or less, and the second tract was a farm known as the Ringgold property, lying south of the town of Greenville. On 26 November, 1924, David S. Smith and his wife, Ella A. Smith, executed and delivered six notes of $1,000 each, payable to bearer, and in order to secure the same executed and delivered to W. A. Darden, trustee, a deed of trust on the property in the town of Greenville, which said deed of trust was duly recorded on 30 December, 1924. Thereafter, on 30 April, 1926, the said David S. Smith and wife, Ella A. Smith, executed and delivered four promissory notes each in the sum of $1,899.22, and in order to secure said notes executed and delivered to D. L. Turnage, trustee, a second deed of trust upon the town property above mentioned, which said deed of trust was duly recorded. The said Smith and wife were also indebted to Mrs. Nannie E. Quinerly in the sum of about $5,400, and in order to secure said indebtedness had executed and delivered a mortgage or deed of trust to said Mrs. Quinerly on the Ringgold farm. Mrs. Ella A. Smith did not sign any of the six $1,000 notes secured by the first deed of trust to Darden, trustee, but did sign the deed of trust. David S. Smith died and thereafter his wife, Ella A. Smith, with her own money paid to the holder of note No. 4, secured by the Darden deed of trust, the amount due thereon and had said note assigned to her in the following language: "This note taken up by and assigned to Mrs. Ella Smith, but it is understood that it is subordinated to notes Nos. 5 and 6 of the same series which are outstanding so that in case of sale the other two notes are to be paid first. In other words, the Nos. 5 and 6 notes take priority as to the security. 2/16/29. W. H. Woolard, agent for holders."

Smith and wife did not pay the note secured by the deed of trust to D. L. Turnage, trustee, and demand was made upon the said trustee to foreclose the deed of trust. The testimony tended to show that Turnage, trustee, before advertising the property discovered that three notes of six thousand secured by the Darden deed of trust had been paid and two of these notes were held by a trust company, and the other note of $1,000 was held by Mrs. Ella A. Smith. Turnage, trustee, talked with Mrs. Smith on 5 December. The evidence further tended to show that Mrs. Quinerly, who held the notes for $5,400 secured by deed of trust on the Ringgold place, was pressing Mrs. Smith for payment of past due interest. Thereupon, on 3 January, 1930, Mrs. Smith transferred to F. G. James, attorney for Mrs. Nannie E. Quinerly, the said $1,000 note held by her with the understanding that Mr. James was authorized to collect the note and apply it on the Quinerly indebtedness. In the meantime Turnage, trustee, was advertising the Greenville property under the deed of trust held by the plaintiff, and said land was sold on 6 January, 1930. After paying the balance of $2,000 due on the first mortgage and certain other charges not involved in this appeal, there was a balance of $2,610.95 due on the indebtedness held by the plaintiff. Whereupon, plaintiff instituted this action to collect from the defendant, Ella A. Smith, the said deficiency of $2,610.95.

Issues were submitted to the jury, and the court charged the jury to answer the first issue in the sum of $7,179.16, the second issue in the sum of $2,610.95, and the third issue, yes. The court answered the fourth issue "No," and the fifth issue, "Yes."

Whereupon, the following judgment was entered: "This cause coming on to be heard before his Honor, Walter L. Small, judge presiding, at the August Term, 1930, of Pitt Superior Court, and a jury, and being heard and issues having been submitted to and answered by the jury, as follows, to wit:

1. At the time of the sale by D. L. Turnage, trustee, referred to in the pleadings, in what amount were D. S. Smith and wife indebted to plaintiff, as evidenced by the notes secured by said trust? Answer: Yes, $7,179.16, with interest from 15 October, 1927, less $61.30 on December, 1927.

2. In what amount is the defendant, Ella A. Smith, indebted to the plaintiff after applying the proceeds of said sale to said notes? Answer: Yes, $2,610.95, with interest from 3 January, 1930.

3. Was the note for $1,000, referred to in the pleadings, delivered by the defendant, Ella A. Smith, to F. G. James, attorney, upon condition that if collected, same was to be applied to the payment of the Quinerly note, and if not collected, no credit was to be made on the Quinerly note? Answer: Yes.

And the court having answered the fourth and fifth issues as follows, to wit:

4. Is the said note of $1,000 a lien upon the property described in the W. A. Darden trust? Answer: No.

5. Is the plaintiff entitled to have the balance of the purchase price paid for the property described in the D. L. Turnage trust applied to the payment of the balance due and owing it by Ella A. Smith, as evidenced by the notes executed to the plaintiff by the said Ella A. Smith and her husband, D. S. Smith? Answer: Yes.

It is now, therefore, upon motion of Harding & Lee, and Albion Dunn, attorneys for the plaintiff, considered, ordered and adjudged that the plaintiff recover of the defendant, Ella A. Smith, the sum of $2,610.95, with interest from 3 January, 1930, and that the balance of the purchase price paid by the plaintiff for the property described in the complaint be, and the same is hereby directed to be applied by said trustee as a payment upon the aforesaid indebtedness found to be due and owing by the said Ella A. Smith to the plaintiff;

And it appearing to the court that all of the indebtedness secured in the trust executed by D. S. Smith and wife, Ella A. Smith, to W. A. Darden, trustee, has been fully satisfied and paid, and that the said notes of $1,000 referred to in the pleadings is the property of the said

Ella A. Smith, and that the plaintiff is entitled to offset the amount due and owing it by the said Ella A. Smith against said note:

It is further considered, ordered and adjudged that said note, by virtue of said offset, has been fully satisfied and paid, and is no longer a lien against the property described in the deed of trust to W. A. Darden, trustee; and the said W. A. Darden, trustee, be, and he is hereby perpetually enjoined from foreclosing said trust; and the said W. A. Darden is hereby directed to mark said deed of trust to him satisfied and cancel the same of record in the office of the register of deeds for Pitt County; and it is further considered, ordered and adjudged that the defendants pay the costs of the action to be taxed by the clerk."

From the foregoing judgment the defendant appealed.

Harding & Lee and Albion Dunn for plaintiff.
F. G. James & Son for defendant.

BROGDEN, J. The case is this: A married man executed six notes for $1,000 each and secured the same by a first deed of trust upon property in the city of Greenville which said deed of trust was duly executed by both husband and wife. Thereafter, the said parties executed notes aggregating $7,596.88 to the plaintiff and secured same by a second deed of trust upon the same property in the town of Greenville. Three of the notes secured by the first deed of trust were paid and the husband died. Thereafter, the wife, having money of her own, went to the holder of the remaining three notes of $1,000 each and purchased one of the $1,000 notes and had the same duly assigned to her by the holder. The plaintiff held the notes secured by the second deed of trust and default in the payment thereof having been made, demanded that the trustee, Turnage, sell the property under said deed of trust. Pending the advertisement, the holder of an indebtedness made by the husband and wife and secured by a mortgage upon farm land, demanded payment of the notes held by her. Thereupon, the widow transferred the $1,000 note which she owned in her own right to the attorney of the holder of the indebtedness on the farm to be applied as a payment upon said indebtedness when collected. Sale was made by the trustee under the second deed of trust on the town property and after applying the proceeds of the sale, there was a deficiency of $2,610.95 due by the defendant.

The plaintiff contends that the $1,000 note secured by the first deed of trust and purchased by the widow, Ella Smith, was not properly applied as a payment on the Quinerly indebtedness, and therefore the said defendant is deemed to be the holder of said $1,000 note, and, as the defendant, Ella Smith, owes the plaintiff $2,610.95, the said plaintiff is entitled to set off said $1,000 note in paying the balance due on the first deed of trust. That is to say, there are three notes of $1,000 each secured by the first deed of trust if the note held by the defendant is secured by the lien of the Darden deed of trust. If not so secured, then the plaintiff must pay only $2,000 to discharge the first or Darden deed of trust and thus eliminate the $1,000 note held by the defendant, Ella Smith, and transferred to Mr. James, attorney for Mrs. Quinerly.

The question of law thereupon arises: If the owner and holder of a note properly transfers the same to a creditor with the understanding that the proceeds thereof shall apply as a payment upon the indebtedness of the creditor when collected, does such transfer amount to a payment when the funds are in hand available to pay said note? The defendant, Ella Smith, purchased the $1,000 note signed by her husband, with her own money, and the same was duly transferred to her. Thereupon, she became the legal owner of said note and entitled to the proceeds thereof. Hence, she had a right to sell, transfer or assign the note. She did assign and transfer the note to Mr. James, attorney for her creditor, Mrs. Quinerly, and authorized him to receive payment thereof and apply same upon the Quinerly indebtedness.

Manifestly the defendant, Ella Smith, being the owner of the note and having the legal title thereto, transferred the legal title to the attorney for Mrs. Quinerly with the attendant right to receive the proceeds of said note when collected. Therefore, Mrs. Quinerly held a valid note secured by the Darden deed of trust which entitled her to collect the note and apply the proceeds to her indebtedness. The proper transfer of a valid note secured by a deed of trust by the owner and holder of such note cannot in any way affect the lien upon the property securing payment thereof. The agreement of Mrs. Quinerly through her counsel, Mr. James, to apply the proceeds of the note when collected, amounted to payment at the instant the funds were properly available for the purpose of payment. This principle was established by the decision of *Grandy v. Abbott,* 92 N. C., 34. The Court said: "But it was correct to tell the jury that if the money was borrowed by and for the debtor, Abbott, under an express arrangement that it should be for the discharge of the debt of the plaintiff, which the attorney then held for the purpose of collection by plaintiff's authority, the debtor has the right to consider the appropriation made as soon as the money sufficient to discharge the claim was thus raised upon his credit. In this the contract is between the debtor and the attorney and agent of the plaintiff, acting in this for his creditor principal. The case is not unlike one in which a debtor places claims against other persons in the hands of the creditor or of his collecting agent, under an agreement that any money derived from the claims shall go in discharge of the debt. If moneys sufficient are thus received they are *eo instanti* applied in extinguishment of the debt, precisely as if the debtor had paid the money, for he does thus pay the money as soon as it passes into the hands of the collecting agent, and must be deemed to be thus applied."

Applying the principle of law to the facts, it is obvious that Mrs. Quinerly is the owner of the $1,000 note transferred to Mr. James, her attorney, by the defendant, Ella Smith. Hence the ruling of the trial judge was erroneously made.

The plaintiff invokes the equity of marshaling and setoff, but these equities are not raised by the facts and are not involved in the merits of this controversy. *Harrington v. Furr,* 172 N. C., 610.

Reversed.

J. L. PHIPPS v. E. G. WYATT.

(Filed 12 November, 1930.)

1. **Estoppel C b—In this case held: trustor was estopped from setting up irregularities in foreclosure proceedings as against bona fide purchaser.**

   Where the trustee in a deed of trust proceeds to advertise and foreclose the land under the terms of the instrument, and upon request of the trustor, continues the sale from day to day for about a month in order to give the trustor time in which to raise the money to pay off the lien, and the trustor is present at the time of the first continuance of the sale and at the time of the actual sale, and made no objection thereto, and failed to raise the bid within ten days, C. S., 2591, and thereafter the purchaser at the sale transfers to a bona fide purchaser without notice: *Held,* the trustor is estopped as against the bona fide purchaser without notice to set up his claim to the land on the grounds of alleged irregularity in the foreclosure proceedings.

2. **Mortgages H m—In this case held: transferee of purchaser at foreclosure sale was bona fide purchaser without notice.**

   The law prima facie presumes the regularity of mortgage sales under power of sale, and where a registered mortgage provides that the trustee's deed upon foreclosure "shall be prima facie evidence" of due advertisement of the property, and the trustee's deed is regular upon its face, a purchaser from the purchaser at the foreclosure sale is not required, in the exercise of due care, to examine the manner of sale and the report of the trustee, and he will be held a bona fide purchaser without notice of alleged irregularities in the advertisement of the property, and *held further,* under the facts of this case, the trustor's contention that the purchaser at the sale bid a grossly inadequate price for the property cannot be sustained against the bona fide purchaser.

3. Mortgages H j—No fiduciary relationship exists between trustor and cestui que trust, and cestui que trust may bid in property at foreclosure.

There is no fiduciary relationship between a trustor and *cestui que trust* in a deed of trust, and the *cestui que trust* has the right to bid in the property at the foreclosure sale under the terms of the deed of trust.

APPEAL by defendant from *Schenck, J.,* and a jury, at May Term, 1930, of ALLEGHANY. No error.

This is an action of ejectment brought by plaintiff against defendant. The evidence on the part of plaintiff was to the effect that defendant, E. G. Wyatt, made (1) a deed of trust to the Federal Land Bank on the property in controversy to secure the payment of $4,500. At the time the property was sold there were about three installments of $147.50 each due the Federal Land Bank and some taxes. (2) A deed of trust to R. F. Crouse, trustee for Mrs. G. C. (Pearl) Perry, to secure the payment of $2,340, dated 6 November, 1926. The property was sold by R. F. Crouse, trustee, upon default, under this deed of trust, and purchased by Mrs. G. C. (Pearl) Perry for $1,600, and at the time there was $1,652 due her, which included principal, interest and cost of sale.

In the statement of case on appeal, is the following: "Default having been made in payment by defendant, and demand having been made upon the trustee to foreclose, under date of 17 July, 1928, the trustee advertised the sale of the land to be sold on 16 August, 1928. Defendant having requested a postponement of the sale to enable him, if possible, to secure the money to pay off the deed of trust, in compliance with said request, on date of sale, as advertised, the trustee continued the sale without readvertisement in a newspaper, made proclamation each day at the hour set for the sale, continuing said sale until the same hour on the following day, and in this manner the sale was continued from day to day until 15 September, 1928, when he sold the land to Mrs. G. C. (Pearl) Perry, *cestui que trust,* upon her bid of $1,600. E. G. Wyatt was present when the sale was continued on 16 August, and when the land was actually sold on 15 September, and made no objection to the sale; and, on 8 October, 1928, R. F. Crouse, trustee, executed a deed conveying said land to Mrs. Perry, the purchaser, which deed was promptly recorded in Alleghany County. Under date of 24 November, 1928, Mrs. Perry sold the land to C. W. Higgins, in consideration of $1,652, and on that date executed a deed conveying the land, which deed was promptly recorded in Alleghany County. Under date of 11 January, 1929, C. W. Higgins sold the land to the plaintiff in consideration of $4,500, and on that date executed a deed conveying said land to the plaintiff, which deed was recorded on .... day of January, 1929. The plaintiff brought suit for possession of the property. The defendant alleged there was not a valid sale under the deed of trust. At the beginning of the trial, the defendant was allowed to amend paragraph 3 of the answer so as to add the following: 'The price bid by the *cestui que trust* was grossly inadequate price.' The plaintiff was allowed to reply so as to deny the amendment. At the conclusion of all the evidence, his Honor directed the jury to answer the issue of possession in favor of the plaintiff."

The following is in the deed of trust from defendant, E. G. Wyatt, to R. F. Crouse, trustee for Mrs. G. C. (Pearl) Perry: "It is further stipulated and agreed that any statement of facts or recitals by said trustee in his deed in relation to the nonpayment of the money secured to be paid, the amount due, the advertisement, sale, receipt of the money, and the execution of the deed to the purchaser, shall be received as prima facie evidence of such fact."

Also the following is in the deed from R. F. Crouse, trustee, to Mrs. G. C. (Pearl) Perry: "And, whereas, under and by virtue of authority conferred by said deed of trust and in accordance with the terms and stipulations of the same and after due advertisement as in said deed of trust prescribed, and by law provided, the said R. F. Crouse, trustee, did, on 15 September, 1928, at the courthouse door, in Sparta, said county and State, expose to public sale the land hereinafter described, and, whereas, Pearl Perry became the last and highest bidder for the same, at the price of $1,600, the said land being sold subject to all prior deed of trust and other liens; and, whereas, said sale was reported to the clerk of Superior Court; and, whereas, more than ten days have elapsed and no upset bid has been filed; and, whereas, the said purchase price has been paid in full as in said deed of trust prescribed," etc.

The evidence on the record shows that the plaintiff, J. L. Phipps was a bona fide purchaser for value and without notice, if there were irregularities in the sale by R. F. Crouse, trustee, of such a nature that a court should set the sale aside between the parties. The deed from Higgins and wife to plaintiff, Phipps, recites a consideration of $4,500.

Phipps testified, in part: "I am the plaintiff. When I bought this land I was living at Meadow Grove, Nebraska. After I got a deed for the land, I think it was 11 January, I came to Piney Creek here, on 7 February, I believe, 1930. That would be a little over thirteen months after I bought the land. I got the deed on 11 January, 1929. I did not know anything about any contentions of Mr. Wyatt or about any irregularities of the sale, about the advertisement. I did not know anything about any equities claimed against the land, any irregularities of the sale. . . . I was to pay Mr. Higgins $4,500 and assume the Federal Land Bank loan. It would not be quite $9,000 I was assuming and paying. $4,500 was what I paid at the start. I haven't paid all of it yet. I paid $1,000. That leaves $3,500 I am due Mr. Higgins. I suppose I can pay the balance tomorrow if I want to. I have got some money to pay it."

The issue submitted to the jury and their answer thereto, was as follows: "Is the plaintiff, J. L. Phipps, the owner and entitled to the possession of the land described in the complaint? Answer: Yes."

The court below charged the jury, in part, as follows: "That if you find the facts to be as shown by all the evidence in the case, that is, the testimony of the witnesses and the record evidence, that you will answer this issue, Yes."

R. F. Crouse and C. W. Higgins for plaintiff.

W. R. Bauguess, George Cheek and W. S. G. Bauguess for defendant.

CLARKSON, J. The sole question involved in this appeal is the charge of the court below: "That, if you find the facts to be as shown by all of the evidence in the case, that is, the testimony of the witnesses, and the record evidence, that you will answer this issue Yes."

We think the charge correct from the facts and circumstances of this case. In the present action it is admitted of record "E. G. Wyatt was present when the sale was continued on 16 August, and when the land was actually sold on 15 September, and made no objection to the sale."

In *Burnett v. Supply Co.,* 180 N. C., at p. 119-120, we find the following: *"There is a wholesome principle in our law to the effect that one who stands by and witnesses in silence a wrongful sale of his property, under circumstances that call on him to speak, will not afterwards be heard to impugn the validity of the sale in so far as the title of the purchaser is concerned. The position depends on the doctrine of equitable estoppel, that under certain conditions will not allow an owner to impeach the purchaser's title when the latter has been misled to his hurt,* but, on the facts of this record, the principle has no place as between the plaintiff and the defendant company, the evidence showing that plaintiff, *an ignorant colored man, merely attended the sale of his property, made over his protest;* that he said or did nothing at the sale to mislead any one; has insisted throughout to the company and its agents that the mortgage debt has been fully paid, and has established his claim at the trial. In such case, we are clearly of opinion that the plaintiff, as against the defendant, is entitled to a settlement on the basis of the actual value of the property, and the verdict and judgment to that effect should be upheld." (Italics ours.)

It is said in *Lewis v. Nunn,* 180 N. C., at p. 163, speaking of the *Burnett case, supra:* "The principle, while recognized, was not applied in that case, because the action was not against the purchaser to redeem, but against the mortgagee, who had wrongfully sold the land when there was nothing due." Further we find: "One who stands by and sees his property bought by another, without protest and without notice of his claim 'Is not permitted to assert his interest afterwards as against the innocent buyer of the property, and to his prejudice, because he was silent when he should have spoken, and now the law will not hear him when he should be silent. He is equitably estopped from being heard and asserting his claim to the property.' *Hardware Co. v. Lewis,* 173 N. C., 295." *Debnam v. Watkins,* 178 N. C., at p. 242.

What are some of the admitted facts and the law applicable? (1) The defendant requested the trustee to continue the sale from day to day to give him an opportunity to raise the money to pay off the lien on his land, this the trustee did. Defendant was present at the sale and made no objection to same. There is no dispute as to the amount of the debt and default, according to the terms of the deed of trust. (2) In the deed of trust defendant stipulated and agreed "Any statement of facts or recitals by said trustee in his deed in relation to the nonpayment of the money secured to be paid, the amount due, the *advertisement,* sale, receipt of the money, and the execution of the deed to the purchaser, *shall be received as prima facie evidence of such fact.*" (3) The plaintiff on examining the record in the register of deeds office, in regard to the title to the land he was purchasing, in the exercise of due care *(Bank v. Trust Co., ante,* 582) would discover that the trustee's deed contained as to the advertisement "shall be received as prima facie evidence of such fact." With this provision in the deed of trust, plaintiff would not be required, in the exercise of due care, to examine the manner of sale and report of the trustee filed with the clerk of the court. In fact, the law prima facie presumes the regularity of mortgage sales under power of sale. *Jenkins v. Griffin,* 175 N. C., 184; *Lumber Co. v. Waggoner,* 198 N. C., 221. (4) That plaintiff purchased not at the sale, but from one who purchased from the purchaser at the sale. The record also discloses that plaintiff was a bona fide purchaser for value and without notice of any irregularities. Conceding, but not deciding, that there were irregularities in the sale, as against plaintiff, from the facts and circumstances of the case, the doctrine of estoppel applies. The defendant is estopped to assert claim to the property in controversy.

This matter has been recently discussed in *Brown v. Sheets,* 197 N. C., 268 (63 A. L. R., 1357) at p. 272, speaking to the subject: "In *Hinton v. Hall,* 166 N. C., p. 480, it was said: 'It was true that failure to advertise according to the terms of the power of sale invalidates the sale. *Eubanks v. Becton,* 158 N. C., 230. But it is said that such sale is not absolutely void, but will pass the legal title. *Eubanks v. Becton, supra; Brett v. Davenport,* 151 N. C., 58. While such sale would be set aside as to the purchaser, a subsequent or remote grantee without notice and in good faith takes a good title against such defects or irregularities in the sale of which he had no notice. 27 Cyc., 1494.' *Whitley v. Powell,* 191 N. C., at p. 477; 19 R. C. L., 623."

Defendant contends that "The sale was not only invalid for lack of proper advertisement, but the consideration paid was so grossly inadequate as to shock the conscience." As against a bona fide purchaser for value without notice this contention, if conceded to be true, cannot be sustained on the facts appearing in the record of this action.

As to the question of inadequacy of price, in this jurisdiction, see *Young v. Highway Commission,* 190 N. C., at p. 57; *Bank v. Mackorell,* 195 N. C., at p. 745; *Lumber Co. v. Waggoner,* 198 N. C., 221.

C. S., 2591, in part, is as follows: "In the foreclosure of mortgages or deeds of trust on real estate, or in the case of the public sale of real estate by an executor, administrator, or administrator with the will annexed, or by any person by virtue of the power contained in a will, the sale shall not be deemed to be closed under ten days." The statute further provides that within ten days an increased bid can be placed upon the land sold, 10 per cent if under $500, and 5 per cent if over. The clerk has discretion to have bond given to guarantee compliance with terms of sale. The sale shall be reopened and the land sold again. This increased bid can be indefinite upon compliance with the statute "Resales may be had as often as the bid may be raised in compliance with this section."

Defendant requested the postponement of sale at the time the sale was regularly advertised. He was present at the postponed sale, knew the land was sold to Mrs. G. C. (Pearl) Perry, and stood by and made no objection. He could have placed in ten days an upset bid on the land or had some one to do it for him, but failed to do this. Mrs. Perry had a right to purchase the land under the sale made by the trustee, as there was no fiduciary relationship between her and defendant Wyatt.

In *Simpson v. Fry,* 194 N. C., at p. 627, *Connor, J.,* speaking for the Court, said: "Nor does the fact that the debtor has conveyed property to a third person to secure his creditor establish any fiduciary relation between him and such creditor."

From the view we take of this action, the cases cited and the position taken by the learned counsel for defendant are not applicable. A court cannot make contracts, nor can a court relieve parties who are *sui juris* from misfortune that overtakes them in cases of this kind. Ordinarily, it is only in cases where there is fraud or mutual mistake, or the mistake of one of the parties, brought about by the fraud of the other, or undue influence, where a Court of Equity will grant relief. These principles are not applicable in the present action. In the judgment below we find

No error.

AMY HARDEN, WIDOW, AND WILL BOOZER HARDEN, MINOR SON, DEPENDENTS, v. THOMASVILLE FURNITURE COMPANY, EMPLOYER, AND HARTFORD ACCIDENT AND INDEMNITY COMPANY, CARRIER.

(Filed 19 November, 1930.)

1. **Master and Servant F b—Death of employee, killed by another employee from personal enmity unrelated to employment, is not compensable.**

   In order for compensation to be recovered for the death of an employee under the Workmen's Compensation Act it is required that the injury causing death result from an accident arising out of and in the course of the employment, as a proximate cause: and where compensation is sought for the killing of one employee by another for purely personal and unrelated grounds, or when one was employed at night and the other by day, and the killing at night was a result of personal enmity alone, and these facts are found by the Commission and approved by the trial judge, the judgment denying the right of compensation will be affirmed on appeal.

2. **Same—Whether injury to employee is result of accident arising out of and in course of employment is question of law and of fact.**

   The question of whether compensation is recoverable under the Workmen's Compensation Act depends upon whether the accident complained of arises out of and in the course of the employment of the one injured, and its determination depends largely upon the facts of each particular case as matters of fact and conclusions of law, and general definitions are unsatisfactory.

APPEAL by plaintiffs from *McElroy, J.*, at February Term, 1930, of DAVIDSON.

This is a proceeding under the North Carolina Workmen's Compensation Act, in which the plaintiffs seek compensation for the death of Robert Boozer Harden.

The case was first heard at Lexington on 24 October, 1929, by J. Dewey Dorsett, Commissioner, who made an award dismissing the claim on the ground that the injury causing the death did not arise out of the employment of the deceased. The plaintiffs made application for a review of this award, which, after a hearing by the full Commission, was duly affirmed. From this decision the plaintiffs appealed to the Superior Court and the award was again confirmed. The plaintiffs excepted and appealed to this Court.

It appears from the statement of the case made by Commissioner Dorsett that Odell Bruton and the deceased had been in the employ of the Thomasville Furniture Company, Bruton as a sweeper working by day, and the deceased as a night-watchman; that between one and three o'clock on the night of 2 August, 1929, Bruton, on account of domestic trouble between the two men, shot and instantly killed the deceased, while the latter was on duty as night-watchman; that there is no evidence of ill will between them relating to any matter pertaining to their work; and that Bruton has been convicted of murder in the second degree and sentenced to imprisonment.

The Commissioner found as facts, that the deceased and the Furniture Company had accepted the provisions of the North Carolina Workmen's Compensation Act and the Furniture Company had insured its liability with its codefendant; that Bruton shot and killed the deceased from ambush; that the injury sustained by the deceased was not the result of an accident arising out of his employment by the Furniture Company; that Bruton's work in the day had no connection with that done by the deceased at night; that the homicide was the result of ill will and matters entirely personal to the two men and disassociated with the employment of either by the Furniture Company; that Bruton was not insane; that the average weekly wages of the deceased were $24.50; and that the plaintiffs were solely dependent upon the deceased at the time of his death.

The findings of fact were approved by the full Commission and the Superior Court found that the facts are supported by the evidence.

Walser & Walser and D. L. Pickard for appellants.
Spruill & Olive for appellees.

ADAMS, J. As defined in the North Carolina Workmen's Compensation Act, the word "death," as a basis for a right to compensation means death resulting from an injury; and "injury" and "personal injury" mean injury by accident arising out of and in the course of the employment, and do not include disease in any form unless it results naturally and unavoidably from the accident. Sec. 2 (f) (j). The mere fact that an injury is the result of the wilful or criminal assault of a third person does not prevent the injury from being accidental. *Conrad v. Foundry Co.,* 198 N. C., 723. We understand it to be conceded that the injury resulting in the death of Robert Boozer Harden was accidental within the meaning of the act and that it arose in the course of his employment. The gravamen of the controversy is the averment and contention that the death resulted from an injury by accident arising "out of" the employment. The Commissioner's fourth finding of facts is to the effect that the injury sustained by the deceased was not the result of an accident arising out of his employment by the Furniture Company; and this finding was afterwards approved by the full Commission.

Whether the accident arose out of the employment is not exclusively a question of fact; it is a mixed question of fact and law. *Bryant v. Fissel,* 86 At. (N. J.), 458; *Todd v. Man. Co.,* 128 At. (Md.), 42; and so, no doubt, the Commissioner and the full Commission intended to treat it—the specific inquiry being whether from facts which are not in controversy it results as a legal inference that the accident did not arise out of the employment.

While the phrase "in the course of" refers to time, place, and circumstance, the words "out of" relate to the origin or cause of the accident. *Conrad v. Foundry Co., supra.* In *Chambers v. Oil Co., ante,* 28, it is suggested that the term "arising out of the employment" is perhaps not capable of precise definition; and *In re Employers' Liability Assurance Corporation,* 102 N. E., 697, the Supreme Judicial Court of Massachusetts remarked that it is not easy to give a definition of the words accurately including all cases within the act and precisely excluding those outside its terms. In the latter case it is said: "It (the injury) arises 'out of' the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

If an employee has sustained an injury, the risk of which might have been contemplated by a reasonable person as incidental to the service when he entered the employment, the injury may be said to have arisen out of the employment; and it may be said to be incidental to the employment when it is either an ordinary risk directly connected with the employment or an extraordinary risk which is only indirectly connected with the service owing to the special nature of the employment. *Bryant v. Fissell, supra; Union Sanitary Co. v. Davis,* 115 N. E. (Ind.), 676.

The decisions of various courts involving injuries inflicted by assault serve to emphasize the remark that each case must be decided upon its special facts. Utterances on the question in various jurisdictions may not easily be reconciled, but we are of opinion that the weight of authority is in support of the principle that if one employee assaults another solely under the impulse of anger, or hatred, or revenge, or vindictiveness, not growing out of but entirely foreign to the employment, the injury should be treated as the voluntary act of the assailant and not as one arising out of or incident to the employment. Particularly is this true if the employees are given different hours of labor and the service of one is in no way related to that of the other. In such case the risk does not "flow from the employment as a rational consequence." *Matter of Heitz v. Ruppert,* 218 N. Y., 148; *Jacquemin v. Turner & Seymour Man. Co.,* 103 At. (Conn.), 115; *Union Sanitary Man. Co. v. Davis, supra; Matter of Scholtzhauer v. C. & L. Lunch Co.,* 233 N. Y., 12; *Pioneer Coal Co. v. Hardesty,* 133 N. E. (Ind.), 298.

A different question arises when the employee is assaulted while he is defending his employer or his employer's property, or when the assault is incidental to some duty of the employment, as in *Ohio Building Safety Vault Co. v. Industrial Board,* 115 N. E. (Ill.), 149, and *Shafter Estate Co. v. Industrial Accident Commission,* 166 Pac. (Cal.), 24.

In the present appeal we do not find any fact or circumstance indicating any causal connection between the conditions under which the deceased was working and the injury he suffered, or by which we may trace the injury to the employment of the deceased as a contributing proximate cause. The evidence taken at the hearing is not in the record, but there is no finding that the deceased was assaulted because he was on duty as a watchman or that he was injured in defense of the employer's property, or by reason of any other fact connected with his service. The motive which inspired the assault was unrelated to the employment of the deceased and was likely to assert itself at any time and in any place. In this respect the present case differs from those cases in which the injury complained of was directly traceable to and connected with the employment. In the light of these facts we are led to the conclusion that the deceased did not sustain an injury by accident arising "out of" the course of his employment. Judgment

Affirmed.

OVERMAN & COMPANY ET AL. v. GREAT AMERICAN INDEMNITY COMPANY.

(Filed 19 November, 1930.)

Principal and Surety B b—Surety on principal contractor's bond held liable for labor and material furnished to subcontractors under terms of bond.

Where a contractor for the building of a public road with the State Highway Commission agrees in his contract to become liable to the Commission for all labor and material required to complete the work, and the surety on the contractor's bond therein obligates itself to pay all sums "for which the contractor is liable," the contract and the indemnity bond will be construed together to ascertain the intent of the parties, and the expression "for which the contractor is liable" includes within the liability of the surety the payment of labor done or material furnished subcontractors of the contractor, such subcontracts being usual in work of this character, and the contract should be liberally construed. C. S., 3846(v).

APPEAL by defendant from *Schenck, J.,* at September Term, 1930, of DAVIDSON.

Civil action in the nature of a creditors' bill, brought under 3 C. S., 3846(v), to recover from surety on contractor's bond for materials furnished and used in and about the construction of a public roadway.

The purpose of the suit is to hold the defendant liable for the claims of plaintiff, and interveners, by reason of a bond executed to the State Highway Commission to secure the faithful performance of a road-building contract, and to protect laborers and materialmen.

Upon denial of liability and issues joined, a reference was ordered and the matters heard by Frank H. Kennedy, Esq., who found the facts favorable to plaintiff and interveners, and reported same, together with his conclusions of law, to the court.

A number of exceptions were filed to the report of the referee, all of which were overruled, and from a judgment confirming the report, the defendant appeals, assigning errors.

Lee Overman Gregory for plaintiff and interveners, Albemarle Grocery Company and Clifton Currin.

Fred B. Helms for defendant.

STACY, C. J. On 20 August, 1927, the J. F. Mulligan Construction Company, contractor, entered into a written agreement with the State Highway Commission to construct and complete a section of road in Randolph and Davidson counties, known as project No. 5210, in which it was stipulated, among other things, that "the contractor shall and will provide and furnish all the materials . . . and perform the work and required labor to construct and complete" said road project; and to insure compliance with the terms of the contract in all respects, the State Highway Commission took from the contractor, as principal, and the Great American Indemnity Company, as surety, a bond in the sum of $16,610 conditioned on the faithful performance of said contract, and that the contractor "shall well and truly pay all and every person furnishing material or performing labor in and about the construction of said roadway all and every sum or sums of money due him, them, or any of them, for all such labor and materials for which the contractor is liable."

The contractor sublet different portions of the work to Ed. Smith, P. R. Huffstetler and Aderholdt Bros. The claims of plaintiff and interveners are for materials furnished to these subcontractors and used by them in and about the construction of said roadway.

The case, therefore, presents the question as to whether the bond in suit is broad enough to cover claims for materials furnished to subcontractors and used by them in and about the construction of the roadway. We think it is.

The defendant concedes that, under the decisions in *Electric Co. v. Deposit Co.,* 191 N. C., 653, 132 S. E., 808, and *Hill v. American Surety Co.,* 200 U. S., 197, plaintiff and interveners would be entitled to recover, if the provision in the present bond stopped short of the phrase "for which the contractor is liable." But this restriction, defendant contends, limits its liability to the payment of claims of persons furnishing materials or performing labor in and about the roadway for which the contractor is directly responsible, and excludes all claims against subcontractors, even though such claims may be for materials furnished and labor performed in and about the construction of said roadway. *Insurance Co. v. Durham County,* 190 N. C., 58, 128 S. E., 469.

This interpretation, we apprehend, is too liberal to the defendant and too restrictive of the rights of laborers and materialmen. Under the road-building contract, the principal contractor agreed to become liable to the State Highway Commission for all materials and work required to complete said roadway, and, in this sense, construing the contract and bond together, the expression, "for which the contractor is liable," is thought not to exclude claims of persons furnishing materials or performing labor in and about the construction of said roadway, whether furnished directly to the principal contractor or indirectly through subcontractors, for, in either event, the materials furnished or labor performed would be in ease of the contractor's liability to the State Highway Commission. *Hill v. Surety Co., supra; Moore v. Material Co.,* 192 N. C., 418, 135 S. E., 113.

The principle is well established that in determining the surety's liability to third persons on a bond given for their benefit and to secure the faithful performance of a construction contract as it relates to them, the contract and bond are to be construed together. *Mfg. Co. v. Andrews,* 165 N. C., 285, 81 S. E., 418. In application of this principle, recoveries on the part of such third persons, usually laborers and materialmen, are generally sustained where it appears, by express stipulation, that the contractor has agreed to pay the claims of such third persons, or where by fair and reasonable intendment their rights and interests were being provided for and were in the contemplation of the parties at the time of the execution of the bond. *Foundry Co. v. Construction Co.,* 198 N. C., 177, 151 S. E., 93; *Brick Co. v. Gentry,* 191 N. C., 636, 132 S. E., 800. The obligation of the bond is to be read in the light of the contract it was given to secure, and ordinarily the extent of the engagement, entered into by the surety, is to be measured by the terms of the principal's agreement. *Dixon v. Horne,* 180 N. C., 585, 105 S. E., 270.

The bond in suit was intended, first, to insure the faithful performance of all obligations assumed by the contractor to the State Highway Commission; and, second, to protect third persons furnishing materials or performing labor in and about the construction of said roadway which the contractor agreed to provide and furnish. *Trust Co. v. Porter,* 191 N. C., 672, 132 S. E., 806. In its second aspect, therefore, the bond contains an agreement between the obligors and such third persons that they shall be paid for whatever labor they perform, or materials they furnish, to enable the principal in the bond to carry out its contract with the State Highway Commission. *U. S. v. Nat. Surety Co.,* 92 Fed., 549.

Bonds of this nature are construed liberally for the protection of laborers and materialmen and with a view to accomplishing the purposes for which they are given, to the end that public works may be paid for and not erected with the use of labor and materials belonging to others. *Electric Co. v. Deposit Co., supra.* It is not thought that the surety can complain at such construction, or that any hardship is imposed thereby, because in entering into the contract the surety is chargeable with notice, not only of the financial ability and integrity of the contractor, but also with notice as to whether he possesses the plant, equipment and tools required in undertaking the particular work, or will be compelled to sublet a portion of it, or rely upon others for labor and materials, all of which are factors to be considered in determining the risk, and upon which the surety fixes the premium for executing the bond. *Wiseman v. Lacy,* 193 N. C., 751, 138 S. E., 121. The rule of *strictissimi juris* is a stringent one, and will not be pursued, where, to do so, would result in a practical injustice to innocent third persons, contrary to the real intent of the parties. *Hill v. Surety Co., supra; Lumber Co. v. Lawson,* 195 N. C., 840, 143 S. E., 847, 67 A. L. R., 984.

Speaking to the policy of the law in this respect, *Dean, J.,* in *Philadelphia v. Stewart,* 201 Pa., 526, says: "Seldom are contractors for large public works able of themselves to furnish the labor and material necessary to the completion of their contracts; in nearly every case they rely on many subcontractors and materialmen to furnish different kinds of mechanical skill and labor, also material, such as stone, brick, lumber, glass, and iron; these have nothing on which to rely for payment except the honesty and ability of the principal contractor. If the contractor of himself does not inspire confidence among these, who must be subordinate to him, his ability in many cases to bid for large work must be weakened or altogether destroyed; as a necessary consequence, competition for work disappears, in large measure, and there follows a monopoly to the few contractors of large capital, with the inevitable result of exorbitant prices. Every one knows the city will pay the principal contractor, but will he pay his subcontractors and materialmen, whether he makes or loses on his contract? is the question with them."

The bond in suit, as it relates to laborers and materialmen, is not limited to "persons who have contracts directly with the principal," as was the case, for example, in *Glass Co. v. Fidelity Co.,* 193 N. C., 769, 138 S. E., 143; nor is it a mere contract of indemnity as in *Clark v. Bonsal,* 157 N. C., 270, 72 S. E., 954, and *Peacock v. Williams,* 98 N. C., 324, 4 S. E., 550. See valuable comment by David L. Krooth in Illinois Law Review, November, 1930, p. 327, *et seq.*

It follows from the foregoing view of the case, which coincides with the holding of the referee and the court below, that the judgment must be

Affirmed.

JAMES F. REID v. WILLIE R. REID.

(Filed 19 November, 1930.)

1. **Evidence A a—Judicial notice will be taken of counties comprising judicial district and persons appointed special judges.**

   When necessary for the determination of a case on appeal, the Supreme Court will take judicial notice of the counties comprising a judicial district, and that a judge holding a term in one of the counties was a special judge appointed by the Governor under the authority of chapter 137, Public Laws of 1929.

2. **Judges A b—Special judge appointed to hold single term of court in county may not hear motion for alimony returnable to that district.**

   Where a special judge has been authorized under commission of the Governor to hold a term of court in only one county of a district, he may not issue an order for alimony, attorney's fees and costs in a proceeding in an action for divorce *a vinculo*, continued to be heard before a judge regularly holding the terms of court in that district and this being determinative of the appeal the question is not presented as to whether it was required that the appellant should make it appear by the Governor's commission, or otherwise, that the regular judge assigned was unable to attend and hold courts, etc. Chapter 137, Public Laws of 1929, sec. 5, Art. IV, secs. 10 and 11, Constitution of North Carolina.

APPEAL by plaintiff from *Johnson, Special Judge,* in Chambers at Albemarle, 9 July, 1930. From ANSON.

Civil action for divorce *a vinculo,* brought by the husband against the wife, on the ground of adultery which is alleged in the complaint and denied in the answer.

Motion in the cause by the wife for alimony *pendente lite* and counsel fees.

From an order entered by Johnson, special judge, in Chambers at Albemarle, awarding the defendant alimony *pendente lite* and expense money, on authority of *Medlin v. Medlin,* 175 N. C., 529, 95 S. E., 857, the plaintiff appeals, assigning errors.

L. B. Clegg and Barrington T. Hill for plaintiff.
McLendon & Covington for defendant.

STACY, C. J. In this cause pending in the Superior Court of Anson County, the defendant lodged a motion at the June Term, 1930, for alimony *pendente lite* and counsel fees, which motion was continued to be heard before Hon. A. M. Stack, resident judge of the Thirteenth Judicial District, at Monroe, Union County, on 26 June, 1930, and was again continued, at the instance of the plaintiff, to be heard, and was heard, before "His Honor, Thomas L. Johnson, judge holding the courts of the Thirteenth Judicial District by exchange, in Chambers at Albemarle, Stanly County, on 9 July, 1930."

Judicial notice will be taken of the fact that Hon. Thomas L. Johnson was, at the time of signing the order in question, one of the special judges appointed by the Governor under authority of chapter 137, Public Laws 1929, and that Anson and Stanly counties are two of the six counties comprising the Thirteenth Judicial District of the State. *Greene v. Stadiem,* 197 N. C., 472, 149 S. E., 685.

The question having arisen as to whether a special judge could be authorized to hold the courts of a county, or district, "by exchange," as indicated on the record, a *certiorari* was directed to the clerk of the Superior Court of Stanly County to send up a copy of the commission under which the special judge was acting at the time the present order was signed. This recites (omitting the formal parts):

"To Hon. Thomas L. Johnson, one of the special judges of the Superior Courts of North Carolina—Greeting:

"Whereas, it has been made to appear to the satisfaction of the Executive Department that good and sufficient reasons exist why P. A. McElroy, one of the judges of the Superior Courts of North Carolina, is unable to hold the term of the Superior Court for the county of Stanly, beginning 7 July:

"Now, therefore I, O. Max Gardner, Governor of the State of North Carolina, by virtue of authority vested in me by law, do hereby commission you to hold said term of said court for the county aforesaid, beginning on Monday, the 7th day of July, 1930, and continue one week, or until the business is disposed of (mixed term)."

It is provided by Article IV, sections 10 and 11, of the Constitution of North Carolina that the State shall be divided into judicial districts, for each of which a judge shall be chosen; that every judge of the Superior Court shall reside in the district for which he is elected; that he shall preside in the courts of the different districts successively, but not in the same district oftener than once in four years; that, in case of the protracted illness of the judge assigned to preside in any district, or of any other unavoidable accident to him, by reason of which he shall be unable to preside, the Governor may require any judge to hold one or more specified terms in said district, in lieu of the judge assigned to hold the courts of the said district; and that "the General Assembly may by general laws provide for the selection of special or emergency judges to hold the Superior Courts of any county, or district, when the judge assigned thereto, by reason of sickness, disability, or other cause, is unable to attend and hold said court, and when no other judge is available to hold the same. Such special or emergency judges shall have the power and authority of regular judges of the Superior Courts, in the courts which they are so appointed to hold."

Pursuant to the authority thus granted in the Constitution, the General Assembly at its regular session, 1929, by general law, chapter 137, authorized the Governor to appoint as many as six special judges of the Superior Courts for terms beginning 1 July, 1929, and ending 30 June, 1931, and to issue to each a commission as his authority to perform the duties of the office of a special judge of the Superior Courts during the time named therein.

Section 5 of said act provides: "That such special judges . . . shall have all the jurisdiction . . . exercised by the regular judges of the Superior Courts in the courts which they are appointed or assigned by the Governor to hold, and shall have power to determine all matters . . . properly before them; but . . . writs, orders and notices shall be returnable before them only in the county where the suit, proceeding or other cause is pending, unless such judge is then holding the courts of that district, in which case the same may be returnable before him as before the regular judge of the Superior Court."

Thus it will be seen that, under the Constitution, the General Assembly is authorized to provide, by general laws, for the selection of special or emergency judges to hold the Superior Courts of any county, or district, "when the judge assigned thereto, by reason of sickness, disability, or other cause, is unable to attend and hold said court, and when no other judge is available to hold the same."

As to whether the commission issued to his Honor, Thomas L. Johnson, special judge, clothed him with authority to hold the June Term, 1930, of Stanly Superior Court, in the absence of a finding by the Executive Department that the judge regularly assigned to hold said court was, by reason of sickness, disability, or other cause, unable to do so, and that no other judge was available to hold the same, we are not now called upon to decide, nor do we express any opinion in this matter. The question is not before us. *S. v. Graham,* 194 N. C., 459. But as the commission purports to authorize only the holding of a single court, and not the courts of the district, as indicated on the record, it is clear that the motion, made in the present cause pending in Anson County, was not properly returnable before his Honor, acting under authority of the above commission, in Stanly County. The language of the statute is that writs, orders and notices shall be returnable before special judges only in the county where the suit, proceeding or other cause is pending, unless such special judge is then holding the courts of that district, in which case the same may be returnable before him as before the regular judge.

The fact that defendant's motion was made returnable in Stanly County at the instance of the plaintiff, or even by consent, can have no bearing on the power of the court to hear the matter. Jurisdiction, withheld by law, may not be conferred on a court, as such, by waiver or consent of the parties. *Springer v. Shavender,* 118 N. C., 33, 23 S. E., 976, 54 A. S. R., 708, 33 L. R. A., 775; 7 R. C. L., 1039.

The order, therefore, will be stricken out as the special judge was without authority to sign the same under the commission held by him at the time, and the cause will be remanded for further proceedings not inconsistent with the rights of the parties. *Greene v. Stadiem, supra.*

Error.

BEESON HARDWARE COMPANY v. D. H. BURTNER ET AL.

(Filed 19 November, 1930.)

Laborers' and Materialmen's Liens C b — Materialman's lien attaches against owner where owner, after notice, pays contractor more than amount of notice.

Where the owner of a building being erected pays according to the contract his contractor a sum of money in excess of the amount due a materialman after he has received notice, and later the contractor abandons his contract and the owner finishes the building at his loss, the materialman's lien attaches to the building as an obligation of the owner under the provisions of our statute. C. S., 2438. *Granite Co. v. Bank,* 172 N. C., 354, cited and applied; *Electric Co. v. Electric Co.,* 197 N. C., 495. cited and distinguished.

APPEAL by defendant, D. H. Burtner, from *Stack, J.,* at May Term, 1930, of GUILFORD. No error.

This is an action to recover of the defendants the sum of $688.18, for materials furnished by the plaintiff to the defendants, Phillips & Horner, and used by the said defendants in the construction of a building on land owned by the defendant, D. H. Burtner, under a contract between the defendants dated 18 August, 1926.

Plaintiff notified the defendant, D. H. Burtner, of its claim for said amount on 20 December, 1926, and thereafter on 8 March, 1927, filed a lien for same on the lot of land described in the complaint. This action to recover the amount of said claim and to enforce the lien therefor was begun on 14 May, 1927.

On 20 December, 1926, the defendant, D. H. Burtner, the owner of the lot of land on which the building constructed by the defendants, Phillips & Horner, under the contract dated 18 August, 1926, was located, was indebted to the said Phillips & Horner, and thereafter prior to 8 January, 1927, paid to said contractors the sum of $759.59, for labor done on the said building. On 8 January, 1927, Phillips & Horner notified the defendant, D. H. Burtner, that they were unable to complete said building in accordance with the contract, and had therefore abandoned same. After receipt of said notice, the defendant, D. H. Burtner, completed said building at a cost to him of $1,017.69, in excess of the contract price.

Upon these facts established by the verdict of the jury, it was adjudged that plaintiff recover of the defendant, D. H. Burtner, the sum of $688.18, with interest from 22 December, 1926, and that said judgment was a lien on the lot of land described in the complaint; it was further adjudged that the defendant, D. H. Burtner, recover of the defendants, Phillips & Horner, the sum of $1,017.69, with interest from 1 March, 1927.

From this judgment the defendant, D. H. Burtner, appealed to the Supreme Court.

D. H. Parsons for plaintiff.
King, Sapp & King for defendant.

PER CURIAM. The judgment to which the defendant, D. H. Burtner, excepted, and from which he appealed to this Court, is supported by the facts established by the verdict of the jury on the trial of this action. The judgment must be affirmed, unless there was error in the trial of the issues submitted to the jury. *Rutherford Hospital v. The Florence Mills,* 186 N. C., 554, 120 S. E., 212.

We find no error in the trial. There was no substantial controversy as to the facts. In *Granite Co. v. Bank,* 172 N. C., 354, 90 S. E., 312, it is said: "It is immaterial whether the contractor had been paid up in full for work done to the time notice was filed by the materialman. The fact that he continued to work under the same contract for the exterior of the building and thereafter was paid $5,262 for work done under the said contract will make the fund thereafter earned subject to the materialman's lien. *Brick Co. v. Pulley,* 168 N. C., 371, 84 S. E., 513."

The instant case is readily distinguishable from *Electric Co. v. Electric Co.,* 197 N. C., 495, 149 S. E., 858. In that case, no payment for work done on the building, under the contract, after receipt of notice, was made by the owner, whereas in the instant case, the jury found upon defendant's admission that he paid to the contractors, after notice by plaintiff of its claim, a sum in excess of the amount of the claim. The fact that the work for which these payments were made was done after notice, is immaterial. The work was done by the contractors, under the contract, and the payments were made for this work. The contractors did not abandon the contract until after this work was done, and until after these payments were made. See *Mfg. Co. v. Blaylock,* 192 N. C., 407, 135 S. E., 136, where it is said: "The policy of the lien law is to protect subcontractors and laborers against loss for labor done and materials furnished in building, repairing or altering any house or other improvement on real estate, to the extent of the balance due the original contractor at the time of notice to the owner of claims therefor, but it is not provided that the owner shall be liable in excess of the contract price, unless he continue to pay after notice of claim from the subcontractor or laborer, and then only to the extent of such payments after notice." C. S., 2438.

No error.

TOWN OF ROCKINGHAM v. MRS. QUEEN COLEY.

(Filed 19 November, 1930.)

Pleadings A c—Motion to be allowed to amend is addressed to discretion of trial court, and his disposition thereof is not reviewable.

As to whether a party to an action be allowed to amend his pleadings is ordinarily a question directed to the discretion of the trial judge and not reviewable on appeal.

APPEAL by plaintiff from *McElroy, J.,* at July Term, 1930, of RICHMOND. Affirmed.

M. C. McLeod for appellant.
J. C. Sedberry for appellee.

PER CURIAM. This is an action to recover $705.63 as assessments on the defendant's abutting lot for improvements made by the plaintiff in 1914 on Washington and Randolph streets. The defendant denied liability and pleaded the statute of limitations. When the case was called for trial the plaintiff made a motion to amend its complaint by pleading chapters 309 and 326 of the Private Laws of 1911. The motion was denied and the plaintiff excepted.

The appellant admits that the action cannot be maintained unless the amendment is allowed. Whether a pleading shall be amended is ordinarily a matter within the discretion of the judge or the trial court, and the exercise of discretion is not reviewable except for palpable abuse. *Gordon v. Gas Co.,* 178 N. C., 435. We find nothing in the record which tends to indicate an abuse of discretion by the judge who presided at the trial. Judgment

Affirmed.

BASKETERIA STORES, INC., v. W. T. SHELTON.

(Filed 26 November, 1930.)

Landlord and Tenant B d—Whether fire had rendered leased property unfit for occupancy held question for jury in this case.

Where, in an action on a lease contract providing that the lease should terminate if the premises were destroyed or rendered unfit for use and occupancy by fire, the evidence discloses that the lessor, upon the happening of a fire in the building, immediately notified the lessee that he would make the necessary repairs, and made the repairs and tendered the premises to the lessee within five days after the lessee had surrendered the keys, and there is conflicting evidence as to whether the premises were damaged by the fire to such an extent as to render them unfit for use and occupancy: *Held,* an instruction that a building is rendered unfit for occupancy when it is damaged to such an extent that it is unfit for carrying on the business of the lessee and cannot be restored to a fit condition without unreasonable interruption of the business, is correct, and the lessee's exception thereto cannot be sustained.

APPEAL by plaintiff from *Clement, J.,* at June Term, 1930, of FORSYTH. Reversed.

This action to recover of the defendant the sum of $650, rent due under a lease from plaintiff to defendant, for the months of July and August, 1929, was begun and tried in the Forsyth County Court, before Efird, J., and a jury.

On 21 February, 1927, plaintiff leased to defendant, for a term of four years, beginning on 15 March, 1927, and ending on 15 March, 1931, a certain portion of a store building located in the city of Winston-Salem, N. C. The lease is in writing, and contains paragraphs as follows:

"2. The lessee agrees to furnish at his own expense, light, heat and water necessary for the occupancy of the building and to make no unlawful use of the premises, to keep the same clean and attractive in appearance, and to deliver the premises to the lessor at the end of the time in as good condition as the same is at the present time, ordinary wear and tear, fire and unavoidable casualties excepted."

"5. It is further agreed that if the building be destroyed or rendered unfit for use and occupancy by fire or other casualty, during the term of this lease, it shall thereupon terminate."

Defendant entered into possession of the premises described in the lease, and paid the rent as stipulated therein until 1 July, 1929. He has failed and refused to pay the monthly rentals which have accrued since said date, contending that the lease terminated on 15 June, 1929, under the provisions of paragraph 5.

On 15 June, 1929, there was a fire inside the store building described in the lease. This fire did not destroy the building. Holes were burned in the floor in the rear of the building and the walls and ceiling were injured by smoke. Some of the fixtures in the building, which was used by the defendant as a shoe store, were burned. Plaintiff immediately notified the defendant that it would have the building repaired, as soon as the defendant had adjusted his claims for loss and damage under his policies of insurance. Within about five days after defendant delivered to the plaintiff the keys to the building, the repairs were made, and the building tendered to the defendant, who declined to reënter into possession.

It is stipulated in the lease that the monthly rental for the premises described therein from 15 March, 1928, to 15 March, 1931, shall be three hundred twenty-five dollars, payable in advance.

The issues submitted to the jury were answered as follows:

"1. Did the plaintiff and defendant enter into the lease mentioned in the complaint, bearing date 21 February, 1927? Answer: Yes (by consent).

2. Did the defendant fail to pay the rent for the months of July and August, as alleged in the complaint? Answer: Yes.

3. If so, was said building destroyed or rendered unfit for use and occupancy by fire or other casualty? Answer: No.

4. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $500."

Upon the verdict it was ordered, adjudged and decreed "that the building occupied by the defendant was not destroyed by fire, or rendered unfit for use and occupancy by the fire or other casualty; and that the plaintiff recover of the defendant the sum of $500 and the costs of this action to be taxed by the clerk."

From this judgment defendant appealed to the Superior Court of Forsyth County, assigning errors based on exceptions duly taken during the trial in the Forsyth County Court.

Upon the hearing of defendant's appeal in the Superior Court, certain of his assignments of error were sustained.

From judgment remanding the action to the Forsyth County Court, for a new trial, plaintiff appealed to the Supreme Court, assigning as error the rulings of the judge of the Superior Court on defendant's assignments of error based on his exceptions taken during the trial in the Forsyth County Court.

Parrish & Deal for plaintiff.
Ratcliff, Hudson & Ferrell for defendant.

CONNOR, J. With respect to the third issue submitted to the jury at the trial of this action in the Forsyth County Court, the judge presiding in said court instructed the jury as follows:

"The court instructs you, gentlemen of the jury, that under a lease of property for the purpose of carrying on therein a store of a certain kind, providing that if the building should be destroyed or rendered unfit for use and occupancy by fire or other casualty, it shall thereupon terminate, such a building is destroyed or rendered unfit for use and occupancy by fire or other casualty, when as a result of a fire or other casualty the building is destroyed or damaged to such an extent that it is unfit for carrying on the business mentioned, and cannot be restored to a fit condition by ordinary repairs such as can be made without unreasonable interruption of the business; that is, such interruption as would cause substantial loss or damage to the business from loss of trade or patronage due to such interruption."

Defendant's exception to this instruction, assigned as error on his appeal to the Superior Court, was sustained. In this there was error. The instruction was not erroneous. There was conflict in the evidence as to the extent of the damage to the building caused by the fire, the plaintiff contending that the damage was not sufficient in extent to render the building unfit for use and occupancy, the defendant contending to the contrary. It was the duty of the court, in this situation, to instruct the jury as to the law applicable to the facts as the jury should find them from the evidence. We think the instruction given to the jury by the court was correct.

Under the provisions of paragraph 2 of the lease, the defendant, as lessee, was under no obligation to repair the damage to the building caused by the fire. This obligation was, by implication, at least, on the plaintiff, as lessor. See *Miles v. Walker,* 179 N. C., 479, 102 S. E., 884. The lease was not terminated by damage caused by the fire, under the provisions of paragraph 5, unless the damage was such as to render the building unfit for use and occupancy for the purposes of the lessee. If the damage could be repaired within a reasonable time, resulting in no substantial loss to the defendant as lessee, the lease could not be declared terminated by either the lessor or the lessee, under the provisions of paragraph 5. This is a reasonable rule, just to both lessor and lessee. We think it must have been within the contemplation of the parties when they entered into the contract.

The instant case is distinguishable from *Ragan v. Lebovitz,* 195 N. C., 616, 143 S. E., 2. In that case the jury found that the leased premises were rendered unfit for use as a department store by fire. It was held that the result of this finding was not affected by the further finding that the damage to the building was such as could be and was repaired within a reasonable time after the fire. The interpretation of the provisions of the lease to the contrary was incorrect. In the instant case, under a correct instruction as to the law, the jury found that the building was not rendered unfit for use and occupancy by the fire. *Archibald v. Swaringen,* 192 N. C., 756, 135 S. E., 849, is distinguishable from both the *Ragan case* and the instant case. It appeared from the pleadings and from all the evidence in that case, that the lessor repaired the damage pursuant to a parol agreement between the lessor and the lessee, entered into subsequent to the discovery of the crack in the dam, through which the water escaped from the swimming pool.

The instruction in this case, which we hold to be correct, is in accord with the law as declared in *Wolff v. Turner,* 6 Ga. App., 366, 65 S. E., 41, cited in note on page 1101 of Anno. Cas., 1913A.

Defendant further excepted to the form of the judgment rendered in this action by the Forsyth County Court, and on his appeal to the Superior Court assigned as error the adjudication therein "that the building occupied by the defendant was not destroyed by fire, or rendered unfit for use and occupancy by fire or other casualty."

The judge of the Superior Court remanded the action to the Forsyth County Court, for a new trial, and for that purpose set aside and vacated the judgment. There was, therefore, no specific ruling on this assignment of error. We think, however, that the adjudication has no other or further effect than the answer of the jury to the third issue.

There was error in the judgment of the Superior Court. For this error the judgment is reversed, and the action remanded to the Superior Court of Forsyth, in order that judgment affirming the judgment of the Forsyth County Court may be entered.

Reversed.

J. S. JORDAN v. MRS. LYDIA McKENZIE.

(Filed 26 November, 1930.)

1. **Process B f—Return of process by sheriff showing service is prima facie evidence of service, but is rebuttable.**

   A summons returned by the sheriff showing service is prima facie evidence that it had been served, but it is not conclusive, and the contrary may be shown by clear and unequivocal evidence.

2. **Judgments K d—Remedy to set aside judgment for failure to serve summons is by motion in original cause when record shows sheriff's return.**

   Where it appears by record that the sheriff's return shows that a summons has been served on the defendant, and the defendant contends to the contrary that in fact it had not been served, the defendant's remedy is by motion in the cause, and when it appears of record that no summons has been served, his remedy is by independent action, and in such instances the judgment is subject to collateral attack.

3. **Appeal and Error K a—Upon failure of court to find facts on motion to set aside judgment for failure of service the case will be remanded.**

   Where a judgment by default has been entered against a defendant by the clerk for the want of an answer, and thereafter the defendant has died and his administrator moves the court to set it aside on the ground that the sheriff's return of service was not in truth and fact correct, and that the summons had not been served, and offers sufficient evidence to sustain his motion, it is the duty of the Superior Court judge hearing and determining the matter to set out in his judgment denying the motion his findings of fact with his conclusions of law, and on appeal the case will be remanded when he has failed to do so.

APPEAL by D. A. McKenzie, administrator of Mrs. Lydia McKenzie, the defendant, from *Barnhill, J.,* at March Term, 1930, of MOORE. Remanded.

This is an action to recover of the defendant the sum of $341.25, damages for breach of the covenant of seizin contained in a deed by which the defendant conveyed to the plaintiff the land described therein.

The action was begun in the Superior Court of Moore County on 22 March, 1928. On Monday, 30 April, 1928, judgment by default final was entered by the clerk of said court. In said judgment it is recited that it appeared to the court that the summons and the complaint, duly verified, had been duly served on the defendant by the sheriff of Scotland County, on 24 March, 1928, and that no answer or other pleading had been filed by the defendant. It was thereupon adjudged, on motion of the plaintiff that plaintiff recover of the defendant the sum of $341.25, with interest and costs.

Since the rendition of the judgment by default final in this action, the defendant, Mrs. Lydia McKenzie, has died. Her son, D. A. McKenzie, was duly appointed her administrator on 11 March, 1930.

On 22 March, 1930, after notice to plaintiff, the said D. A. McKenzie, administrator of Mrs. Lydia McKenzie, the defendant, moved in the action before the clerk of the Superior Court of Moore County, that the judgment by default final be set aside and vacated, on the ground (1) that the summons herein was never served on the defendant, Mrs. Lydia McKenzie, notwithstanding the return thereon to the contrary; and (2) that in any event, upon the cause of action alleged in the complaint, plaintiff was not entitled to judgment by default final, but at most only to judgment by default and inquiry.

From the order of the clerk, denying his motion, the said D. A. McKenzie, administrator of Mrs. Lydia McKenzie, appealed to the judge of the Superior Court, holding the courts of Moore County.

At the hearing of said appeal at March Term, 1930, of the Superior Court of Moore County, evidence was offered by the said D. A. McKenzie, administrator, tending to show that on 24 March, 1928, the day on which it appears from the return thereon, that the summons in this action was served by the sheriff of Scotland County, Mrs. Lydia McKenzie, the defendant, was at the home of her son, D. H. McKenzie, in Scotland County; that on said day the said defendant was confined to her bed, suffering from a disease, which soon thereafter caused her death; that because of said disease, she was at times delirious, and incapable of understanding the purpose and effect of the service of a summons; that her condition, both physical and mental, on said day, was made known to the deputy sheriff, who had come to her son's home to serve the summons and complaint in this action; that at the request of defendant's son, the deputy sheriff did not read or undertake to read the summons to Mrs. Lydia McKenzie, or leave with her a copy of said summons or complaint; that a copy of the summons and complaint was left by the deputy sheriff with the son of Mrs. Lydia McKenzie, who undertook to deliver the same to the defendant as soon as she should be capable of understanding the purpose and effect of the same; and that from said date to the date of her death, shortly thereafter, Mrs. Lydia McKenzie was continuously incapable, because of her disease, of understanding either the purpose or effect of the service of a summons, and for this reason, her son did not deliver the copies of the summons and complaint to her. The only evidence offered by the plaintiff was the return on the summons, from which it appeared that the summons had been duly and regularly served on the defendant by the sheriff of Scotland County, on 24 March, 1928.

At the conclusion of the hearing judgment was rendered by the judge presiding, denying the motion of D. A. McKenzie, administrator, and affirming the order of the clerk.

The only fact set out in the judgment as found by the judge, with respect to the service of the summons, is as follows: "That the summons herein appears to have been duly and regularly served."

The judge did not pass upon the contention of D. A. McKenzie, administrator, that on the cause of action alleged in the complaint, plaintiff was not entitled, in any event, to a judgment by default final. He concluded only that "by the default judgment rendered substantial justice has been done, and the motion therefore is denied."

From the judgment denying his motion, and affirming the order of the clerk, D. A. McKenzie, administrator of Mrs. Lydia McKenzie, the defendant, appealed to the Supreme Court.

L. B. Clegg for plaintiff.
Henry Seawell for defendant.

CONNOR, J. Where it appears on the record, as in the instant case, that the summons in an action was duly served, and the defendant alleges that in truth and in fact the summons was not served, as appears by the return thereon, and on this ground the defendant prays that a judgment by default be set aside and vacated, his remedy is by a motion in the cause, and not by an independent action; it is otherwise, where it appears on the record that no summons was ever served on the defendant. In the latter case the judgment is subject to collateral attack, whereas in the former case the attack must be direct, and made by motion in the action in which the judgment was rendered. This principle is stated by *Walker, J.,* in *Stocks v. Stocks,* 179 N. C., 285, 102 S. E., 306, and is approved as stated by *Allen, J.,* in *Caviness v. Hunt,* 180 N. C., 384, 104 S. E., 763.

The return of a sheriff or other officer to whom a summons was directed for service, showing that the summons has been duly served on the defendant, while prima facie sufficient to show that the summons has been served, is not conclusive. The contrary may be shown by evidence which is clear and unequivocal. *Long v. Town of Rockingham,* 187 N. C., 199, 121 S. E., 461.

In the instant case, it does not appear from the judgment that the judge has found the facts involved in the contention of appellant that the summons was not in truth and in fact served on defendant, or that the judge has passed upon or decided the question of law involved in the contention that upon the cause of action alleged in the complaint, plaintiff was not entitled, in any event, to judgment by default final. The action is therefore remanded, with direction that the judge find the facts from the evidence and set them out in his judgment, and if he shall find that the summons was in truth and in fact duly served on the defendant, as appears by the return thereon, with direction that he pass upon and decide the question involved in the motion, whether on the allegations of the complaint, the plaintiff was entitled to judgment by default final. It is so ordered.

Remanded.

DEWEY L. PETERS v. CAROLINA COTTON AND WOOLEN MILLS, INC., AND JOHN SMITH.

(Filed 26 November, 1930.)

1. **Electricity A a—Electricity is an intrinsically dangerous force and requires frequent inspection.**

   Electricity is a most deadly and dangerous power and requires frequent inspection and unremitting diligence on the part of those who furnish it for use.

2. **Master and Servant D a—Instruction that liability of owner letting work to independent contractor was that of master held error.**

   Where, in an action against an employer and the owner of a mill for injuries received by an employee in the construction of an addition thereto, the evidence discloses that the employer was an independent contractor, and that his foreman ordered the plaintiff employee to roll up a piece of wire connected to the wiring of the mill, and used for lighting the addition for the use of the workers, and that this lighting equipment was furnished by the owner, and that the employee, in attempting to remove the wire, was shocked and injured by reason of improper insulation, and that he had not been warned that the wire was charged with current: *Held,* the owner was under duty to exercise reasonable care to see that the wire was properly insulated, and the contractor was under duty to exercise like care to see that in rolling the wire the employee was not unduly exposed to danger, but an instruction that between the owner and the employee there existed the relation of master and servant is reversible error to the owner's prejudice as depriving it of the defense to which it was entitled.

APPEAL by defendants from *Johnson, Special Judge,* at February Term, 1930, of ROCKINGHAM. New trial.

Civil action to recover damages for personal injury in which the issues of negligence, contributory negligence, and damages were answered against the defendants and in which judgment was given in favor of the plaintiff.

H. L. Fagge and Glidewell, Dunn & Gwyn for plaintiff.
King, Sapp & King for Carolina Cotton and Woolen Mills.
J. Hampton Price for John Smith.

ADAMS, J. The defendants made a contract in writing by the terms of which John Smith was to build a warehouse for his codefendant at an agreed price. In his brief the plaintiff admits that Smith was an independent contractor for whose negligence the Carolina Cotton and Woolen Mills is not liable unless the work to be done by Smith was inherently dangerous or unless the company furnished instrumentalities for doing the work which were inherently and necessarily dangerous. *Denny v. Burlington,* 155 N. C., 33; *Hopper v. Ordway,* 157 N. C., 125; *Greer v. Construction Co.,* 190 N. C., 632; *Drake v. Asheville,* 194 N. C., 6.

The plaintiff testified that he had been employed by Grubbs, who was working under Smith; that at the time of the injury Smith was engaged in building a storage warehouse for the Carolina Cotton and Woolen Mills; that Smith's foreman instructed him to take down a wall which stood between the old building and the new; that while doing this work he found a wire laid on nails along the wall and was instructed by the foreman to remove it; that he had not been warned and did not know that it was charged with electricity, and that in rolling it up he came in contact with an uninsulated section of it and was thereby shocked and seriously injured.

There is evidence that the wire in question was a part of the electric system operated by the Carolina Cotton and Woolen Mills, and that it was connected by the company's electrician with a wire in the old building and extended to the one under construction. The company put it up to enable the contractor to have lights while pouring cement and to use drills in boring holes in the woodwork. Several drills were used for this purpose, one or two of which were furnished by the company. Here, then, was an instrumentality furnished, not by the contractor, but by the company. Was it inherently dangerous? If it was, the company cannot escape liability merely on the ground that Smith was an independent contractor.

The erection of a warehouse is not intrinsically dangerous, but electricity "is the most deadly and dangerous power recognized as a necessary agency in developing our civilization and promoting our comfort." *Mitchell v. Electric Co.,* 129 N. C., 166. The danger it involves requires frequent if not constant inspection and unremitting diligence on the part of those who furnish it for use. *Shaw v. Public Service Corporation,* 168 N. C., 611. The law exacted of the company the duty of exercising reasonable care to see that the wire was properly insulated; and it imposed upon the contractor the duty of exercising like care to see that in rolling the wire his employee was not unduly exposed to danger. *Cotton v. R. R.,* 149 N. C., 227; *O'Brien v. Parks Cramer Co.,* 196 N. C., 359; *Paderick v. Lumber Co.,* 190 N. C., 308.

The trial judge instructed the jury in reference to the first issue upon the theory that Smith was not an independent contractor and that between the company and the plaintiff there existed the usual contractual relation of master and servant. As the plaintiff admits, this was erroneous. When it is sought to bring the relation existing between a party who furnishes instrumentalities and an employee of an independent contractor within the principle stated in *Paderick v. Lumber Co., supra,* the law as therein declared should be applied—not merely the law arising out of a contract of employment. The instruction deprived the company of the defense to which it was entitled and probably misled the jury as to the law with respect also to Smith.

We cannot hold upon the record evidence as a matter of law that the plaintiff was guilty of contributory negligence.

New trial.

THE ENGLISH DRUG COMPANY v. FRED M. HELMS AND HIS WIFE, ESTELLE HELMS.

(Filed 26 November, 1930.)

Landlord and Tenant B b—Under facts of this case lessee was entitled to recover under agreement for payment by lessor of cost of heating plant.

Where under a written contract the lessee installs a heating plant in the leased premises whereby the lessor agrees to pay him the amount he paid therefor at the expiration of the lease, and accordingly the lessee makes demand for this exact amount, which is not disputed, further stipulations in the lease contract that the parties shall agree upon the cost of the heating plant "and place the same in writing" is not prerequisite to the lessee's right of recovery in his action for the actual cost of the plant.

APPEAL by defendants from *McElroy, J.,* at August Term, 1930, of UNION. No error.

This is an action to recover of the defendants the sum of $1,672.67, the amount expended by plaintiff for the installation of a steam heating plant in a building owned by defendants, and occupied by plaintiff, under a lease from defendants. The steam heating plant was installed in said building, during the term of the lease, pursuant to a provision therein as follows:

"It is further agreed, and the parties of the first part hereby consent that the party of the second part may, if it should see fit at any time during the lease period, put in steam heat in said building, and if it does put steam heat in said building, it shall bear all expense thereof, but shall submit said expense to the parties of the first part so that they will know the exact cost thereof, and at the end of said lease period, or at the end of any renewal of said lease—should the same be renewed—the parties of the first part agree and bind themselves to pay to the party of the second part, when the said party of the second part terminates the occupancy of said premises, at the end of this lease period, or any renewals, or extensions thereof, the exact amount that it cost the party of the second part to put in said steam heating plant, without interest. In order that there may be no misunderstanding in regard to the cost, when the same is installed—if the party of the second part installs the same—the parties shall agree upon said figures and place the same in writing."

The terms of the lease expired on 1 January, 1930. The lease was not renewed or extended. This action was begun on 7 January, 1930.

The uncontradicted evidence offered by the plaintiff showed that plaintiff installed a steam heating plant in the building while the lease was in force, and expended for such installation the sum of $1,772.67. Thereafter the plant was damaged by fire. Plaintiff collected from an insurance company the sum of $100, in full settlement of its loss and damage, which sum it applied as a credit on the amount which it had expended for the plant, leaving a balance of $1,672.67.

There was no evidence tending to show that at the time the steam heating plant was installed, plaintiff submitted to defendants the exact cost of said plant, although all the evidence showed that defendants were advised of the purpose of plaintiff to install the plant, and were consulted as to the cost of same.

Plaintiff did not allege in its complaint or offer evidence tending to show that plaintiff and defendants agreed in writing or otherwise as to the cost of the plant prior to the commencement of the action.

The issue submitted to the jury was answered as follows:

"In what amount, if any, are defendants indebted to the plaintiff? Answer: $1,672.67."

From judgment that plaintiff recover of the defendants the sum of $1,672.67, with interest from 18 August, 1930, and the costs of the action, defendants appealed to the Supreme Court.

John C. Sikes for the plaintiff.
Vann & Millikin for defendants.

CONNOR, J. Under the provision in the lease, on which the cause of action alleged in the complaint is founded, as correctly construed in the court below, the defendants are liable to plaintiff for the amount expended for the installation of the steam heating plant in defendant's building. This liability is not dependent upon the submission by the plaintiff to the defendants at the time the plant was installed, of the exact amount of its cost, nor upon an agreement in writing between the parties, prior to the commencement of the action, as to said amount. Neither such submission, nor such agreement is a condition precedent to the right of plaintiff to recover in this action. The principle stated in *Wade v. Lutterloh,* 196 N. C., 116, 144 S. E., 694, and cases cited therein, and relied on by defendants, although well settled, has no application in the instant case.

The defendants agreed and bound themselves to pay to plaintiff, when plaintiff surrendered possession of their building, including the steam heating plant installed therein by plaintiff, at its own expense, the exact amount of the cost of said plant. All the evidence showed a substantial compliance by the plaintiff with the provision that it should submit to defendants the exact amount expended by it for the plant. It is manifest that plaintiff could not agree in writing as to such amount without the concurrence of defendants. It is apparent that there is no controversy between the parties to this action as to the amount actually expended by plaintiff for the steam heating plant.

Defendants' assignments of error based on their contention that plaintiff is not entitled to recover in this action cannot be sustained.

There was no error in the judgment sustaining plaintiff's demurrer *ore tenus* to the counterclaim of defendants. This counterclaim is founded on a tort, while the cause of action alleged in the complaint is founded on a contract. The tort alleged does not arise out of and has no relation to the contract or transaction alleged in the complaint. C. S., 521. See *Thompson v. Buchanan,* 195 N. C., 155, 141 S. E., 580; *R. R. v. Nichols,* 187 N. C., 153, 120 S. E., 819.

We find no error on this appeal. The judgment is affirmed.

No error.

R. E. SURRATT v. GEORGE E. DENNIS ET AL.

(Filed 26 November, 1930.)

Cemeteries B a—Where it is found upon supporting evidence that use of land as cemetery would endanger public health such use may be enjoined.

The facts found by the trial judge in his order, supported by evidence, restraining the use of lands for a cemetery for the reason of injury to health of those living near and of special injury to the plaintiff are conclusive upon the Supreme Court on appeal, and the order will be sustained in equity on the ground that the law cannot afford an adequate remedy in awarding damages.

APPEAL by defendants from *Schenck, J.,* at August Term, 1930, of GUILFORD. Affirmed.

This is an action to restrain the defendants from using the land described in the complaint as a cemetery for the burial of the dead, on the ground that such use of said land will constitute a public nuisance, causing plaintiff, who resides on land owned by him and located within a short distance from said land, special damages.

The action was heard on motion of plaintiff that defendants show cause why a temporary restraining order theretofore issued therein should not be continued to the hearing.

From judgment on the facts found by the court that the temporary restraining order be continued to the hearing, in accordance with the motion of the plaintiff, the defendants appealed to the Supreme Court.

Frazier & Frazier for plaintiff.
A. M. Scarborough and King, Sapp & King for defendants.

CONNOR, J. From the affidavits and other evidence offered at the hearing, the court found as a fact that the health of the plaintiff, and of other residents of the community in which the land described in the complaint is located, will be injured by the use of the said land as a cemetery for the burial of the dead. There was evidence in support of this and other findings of fact, upon which the judgment was rendered. The findings of fact which are set out in the judgment as required by C. S., 569, will therefore not be disturbed. *Board of Health v. Lewis,* 196 N. C., 641, 146 S. E., 592, and cases cited therein.

In *Clark v. Lawrence,* 59 N. C., 83, the principle of law applicable to this appeal is stated by *Battle, J.,* as follows: "Whenever, then, it can be clearly proved that a place of sepulture is so situated that the burial of the dead there will endanger life or health, either by corrupting the surrounding atmosphere, or the water of wells or springs, the court will grant its injunctive relief upon the ground that the act will be a nuisance of a kind likely to produce irreparable mischief, and one which cannot be adequately redressed by an action at law." This principle is approved in *Board of Health v. Lewis,* 196 N. C., 641, 146 S. E., 592. In that case it is said: "While, therefore, a cemetery in which the dead have been and will be buried, is not a nuisance *per se,* it may be shown that a particular cemetery, by reason of facts and circumstances affecting it, is a nuisance, and upon such showing, an injunction will be decreed, permanently enjoining and restraining the burial of dead bodies in such cemetery. In an action for such injunction, upon the finding by the judge that the cemetery or burial ground is and will continue to be a nuisance, a temporary restraining order will be issued, and after hearing upon due notice to defendants, the order will be continued to the final hearing when issues arising upon the pleadings involving the question as to whether the cemetery is a nuisance will be tried and determined."

It is generally held that a Court of Equity has jurisdiction to enjoin the use of land as a cemetery, for the burial of the dead, where it is found by the court that such use will create a public nuisance, resulting in special damages to the plaintiff. 11 C. J., p. 56, sec. 16, and cases cited in notes. 5 R. C. L., p. 235, sec. 3, and cases cited in notes.

The judgment in the instant case is well supported by the facts found by the court and is, therefore,

Affirmed.

OLIVER T. WALLACE v. JOHN D. BELLAMY ET AL.

(Filed 26 November, 1930.)

1. **Deeds and Conveyances D a—Construction of deed in this case held properly submitted to the jury.**

   Where the defendant is the owner of lands along the Ocean front and enters possession under his deed which gives the right of ingress and egress over lands extending westward to a "Banks Channel" to cease whenever the grantor should open and establish streets or alleys extending from "Banks Channel" to the Ocean either to the north or south of the premises conveyed: *Held,* the expression "to the north or south of the premises," with reference to the streets or alleys contemplated, is ambiguous as to their location, leaving the question of their location for the jury, and an instruction that the streets or alleys opened up must have been contiguous to defendant's lots or reasonably near thereto so as to make it reasonably convenient to the owners to pass to the Ocean or Sound is not error to the defendant's prejudice, and defendant's request for a directed verdict in his favor as a matter of law was properly denied.

2. **Adverse Possession A e—Party taking possession under deed and later claiming adversely may not tack prior adverse possession of another.**

   Where a grantee of lots enters possession under a deed giving him the right of ingress and egress over other lands of the owner to terminate upon the opening of streets or alleys, he, taking in accordance with his conveyance may not tack the possession of a prior adverse possessor who did not take under these conditions, in claiming title by twenty years adverse possession.

3. **Adverse Possession A f—Where deed grants easement over lands the grantee may not claim right adversely until termination of easement.**

   Where the grantee of lands enters possession of certain lots of land under a deed giving him the right of ingress and egress over other lands of the grantor until the happening of an event that will make such right unnecessary: *Held,* until the happening of that event only a permissive use of the land for the purposes stated is acquired by the grantee, and where he claims the right by adverse possession his possession will not be held to be adverse until he has done some open or overt act amounting to an assertion of the right by him adversely or until the event that was to terminate his easement under the deed has happened.

CLARKSON, J., dissenting.

APPEAL by defendants from *Grady, J.,* at December Term, 1929, of NEW HANOVER. No error.

Upon the allegations in his complaint the plaintiff prayed that he be adjudged the owner of certain lots in Wrightsville Beach and that the defendants' claim thereto be declared a cloud upon his title. The plaintiff waived his demand for damages and only two issues were submitted to the jury:

1. Is the plaintiff the owner of the record title to the lands in controversy, being the lands lying to the west of lots 23 and 24, and included within the extended northerly and southerly lines of said two lots to the sound, as indicated on the plat offered in evidence?

2. Have the defendants been in the open, notorious, hostile and adverse possession of said lands, claiming the same as their own for twenty years next before the commencement of this action, as alleged in the answer?

By consent of the defendants the court answered the first issue in the affirmative; to the second, the jury responded "No." It was thereupon adjudged that the plaintiff is the owner of the land in controversy and that a writ issue evicting the defendants and putting the plaintiff in possession.

It is admitted that the defendants are the owners of lots 23 and 24 as represented on the map. These lots are situated between the Atlantic Ocean on the east and the right of way of the Wilmington Seacoast Railroad Company on the west. The land in controversy lies to the west of lots 23 and 24, its northern boundary being a line represented by an extension of the north line of lot 24 from the right of way to Banks Channel, its southern boundary being a line represented to an extension of the south line of lot 23 from the right of way to the Channel, its eastern boundary the right of way, and its western boundary Banks Channel.

On 19 July, 1893, the Wilmington Seacoast Railroad Company, conveyed to Fannie S. Fishblate lots 23 and 24, together with a right of way on the disputed land, in the words following: "Also the right of way in and over the lands of the party of the first part, lying between the premises hereby conveyed and Banks Channel on the west, for the purpose of ingress and egress; but the right of way shall cease and determine whenever the party of the first part shall open and establish streets or alleys extending from Banks Channel to the Ocean, either to the north or south of the premises hereby conveyed." The right of way here described is on the controverted lands; it is a right of ingress and egress granted the owner of lots 23 and 24 and must not be confused with the railroad company's right of way.

Mesne conveyances of this property, with the same provision for a right of ingress and egress, were duly executed and registered, and on 26 May, 1906, E. C. Holt and his wife executed and delivered to the defendants John D. Bellamy and Emma A. Bellamy a deed for the property above described with the same provision relating to the right of way on the land in suit.

The lots laid off on the map extend from the railroad track eastward to the highwater mark of the Ocean; the land between the railroad track and Banks Channel was not laid off in lots or subdivided; and no part of it was embraced in the deeds conveying title to lots east of the railroad. This land was the property of the Wilmington Seacoast Railroad Company. Title to the land sued for was, therefore, not included in the deed conveying lots 23 and 24 to the defendants.

Without objection the plaintiff offered in evidence the merger of the Wilmington Seacoast Railroad Company, the Wilmington Street Railway Company, and the Wilmington Gas Light Company, forming the Consolidated Railways, Light and Power Company, and the defendants admitted that the last named company is the successor to the record title of the Wilmington Seacoast Railroad Company.

The plaintiff introduced: (1) A deed from the Consolidated Railways, Light and Power Company to the Tidewater Power Company, dated 23 April, 1907, defendants admitting that the latter company is the successor of the record title of such property as the former company owned on Wrightsville Beach; (2) a deed from the Tidewater Power Company to the plaintiff dated 26 July, 1927. The plaintiff says that in this way he acquired title to the controverted land. Indeed, by consenting that an affirmative answer be given to the first issue the defendants admitted that the plaintiff has the record title. But it is contended by the defendants that no street or alley extending from Banks Channel to the Ocean has ever been opened and established as contemplated by the parties to the several deeds conveying title to lots 23 and 24. To meet this contention the plaintiff introduced a deed, dated 13 June, 1927, from the Tidewater Power Company (certain mortgagees joining in its execution) to the town of Wrightsville Beach, conveying several lots upon this condition: "*Provided, however,* and this deed is given upon the express condition that the said lots or parcels of land hereby conveyed to the said party of the third part shall be opened up and used only for streets by the town of Wrightsville Beach, and, in the event that the said lots or parcels of land, or any one of them, shall hereafter cease to be used for such streets, this deed as to such lot or lots of land shall be void and such lot or lots of land shall thereupon immediately revert to the party of the first part, its successors and assigns."

Other facts material to the decision are set out in the opinion.

Davis & Poisson for plaintiff.
Emmett H. Bellamy and George L. Peschau for defendants.

ADAMS, J. It is essential that we bear in mind the significance of the issues. Only two were formulated because they involve the whole controversy. The defendants admitted that the plaintiff has the record title and consented that to the first issue an affirmative answer should be given by the trial court. The principal question thus left undetermined was that of the defendants' adverse possession, although there are assignments of error based upon the court's refusal to dismiss the action, and upon the charge and the exclusion of evidence.

The real source of the controversy is the following clauses in the deed under which the defendants acquired title to lots 23 and 24: "Also the right of way in and over the lands of the party of the first part, lying between the premises hereby conveyed and Banks Channel on the west, for the purpose of ingress and egress; but the right of way shall cease and determine whenever the party of the first part shall open and establish streets or alleys extending from the Banks Channel to the Ocean, either to the north or south of the premises hereby conveyed."

These clauses are in all the deeds under which the defendants claim title. On 13 June, 1927, the Tidewater Power Company, which derived its title through mesne conveyances from the Wilmington Seacoast Railroad Company, as the defendants derived theirs, executed and delivered to the town of Wrightsville Beach certain lots to be "opened up and used only for streets"; and on the same day the Tidewater Company conveyed to the plaintiff several parcels of land, including that which is in controversy. The plaintiff took his title subject to this provision. It is immaterial, therefore, whether the streets, if opened at all, were opened by the plaintiff or his predecessor in title.

The defendants suggest that a letter written by the male defendant from Fiesole, Italy, on 10 June, 1927, led to an attempt by the Tidewater Power Company to open the streets in order to deprive the defendants of their right of ingress and egress. In view of the dates borne by the letter and the deed this would seem to be improbable; but if the streets were opened and established the motive is immaterial. *Bell v. Danzer,* 187 N. C., 224.

It is insisted by the appellants that the streets just referred to are not contiguous or so near to the defendants' property as to be available as a right of way from the Ocean to the Sound, and that it is impossible to open such streets without obtaining a reconveyance from the owners of lots 25 and 26 on the north or of lot 22 on the south of lots 23 and 24. In effect this is a contention that the proposed streets must adjoin lots 23 and 24, or at least one of them, and that the trial court should have given such construction to the several deeds. This interpretation would result in very seriously impairing, if not practically destroying, the entire scheme upon which the sale of lots and the erection of buildings was founded; it would require the appropriation of about one-third the building lots for the use of streets. It is manifest that such a result was not in the minds of the parties. For this reason, it may be, the defendants receded somewhat from this position by saying that the language of the deeds imports that the right of way should continue until a street or alley should be opened next to, or adjoining, or so near their lots as to be reasonably convenient for the owners' use and for the use of their guests and friends. But on this point the appellants have no ground of complaint, for the judge's instruction to the jury was in substantial agreement with this view, as is obvious from the following paragraph: "The language of this deed, gentlemen, from Holt to Mr. and Mrs. Bellamy, says that the right of way granted in said deed shall cease and determine whenever a street or alleyway shall be opened and established to the north or south of said lot. That means, I charge you, that the street must have been opened contiguous to said lot, and if not, so reasonably near thereto as to make it convenient to the owners of the lot to pass to the Ocean and Sound."

It is said by the appellants that the north street or alley is 260 feet from lots 23 and 24, and the one on the south is distant 210 feet, and that his Honor, instead of submitting the question to the jury, should have held as a conclusion of law that neither of them was a street or alley in contemplation of the provisions contained in the deeds.

We find no agreement or stipulation in the chain of title as to the proximity of the streets or alleys to the lots owned by the defendants. The deeds contain the contract of the parties; and by the terms thereof they must abide. In the interpretation of contracts the general rule is that a court will not resort to construction where the intent of the parties is expressed in clear and unambiguous language; but if the terms are equivocal or ambiguous the jury may in proper cases determine the meaning of the words in which the agreement is expressed. This elementary principle is of frequent application in ascertaining the intention of the parties. *Porter v. Construction Co.*, 195 N. C., 328; *Patton v. Lumber Co.*, 179 N. C., 103; *Faust v. Rohr*, 166 N. C., 187; *Young v.*

Jeffreys, 20 N. C., 357. The provision that the defendants' right of way should cease and determine upon opening and establishing the contemplated streets or alleys was clearly expressed; but the term "north or south of the premises" is ambiguous. For the reasons above stated we concur in his Honor's conclusion that the parties did not contemplate that the streets or alleys should necessarily adjoin the lots owned by the defendants, but that they should be near enough to enable the defendants with reasonable convenience to go to and from the Sound. As previously observed, the defendants seem to have conceded the correctness of this position. The jury were told to pass upon the question as preliminary or incidental to their determination of the time when the defendants' alleged adverse possession began. The question being incidental, a mere question of fact, a separate issue was not necessary. *Bailey v. Hassell,* 184 N. C., 450; *Power Co. v. Power Co.,* 171 N. C., 248. Moreover, the defendants did not object to the issues of record or tender an issue addressed to the location of the streets. They should have done so if they desired to take advantage of the alleged error. *Bank v. Bank,* 197 N. C., 526; *Drennan v. Wilkes,* 179 N. C., 512; *Maxwell v. McIver,* 113 N. C., 288; *Porter v. R. R.,* 97 N. C., 66; *Clements v. Rogers,* 95 N. C., 248.

The issues submitted and the verdict returned indicate that the appellants rested their case principally upon the defense of adverse possession. The defense presupposes the opening of the streets, because up to the time they were opened and established the defendants' right to use the land had been permissive; that is, the easement had remained permissive until the defendants had committed some act sufficient in character to point to an adverse claim. The permissive exercise of an easement does not silently bar the owner's title. The defendants cannot assert title under and at the same time against the plaintiff and those from whom his title was derived. *Whitten v. Peace,* 188 N. C., 298; *Perry v. White,* 185 N. C., 79; *Vanderbilt v. Chapman,* 175 N. C., 11; *Snowden v. Bell,* 159 N. C., 500.

The plaintiff offered evidence tending to show that the streets or alleys referred to in the deeds had not been opened and established until 1927; the defendants introduced deeds making provision for streets more than twenty years earlier. If the former position is correct the defendants' adverse possession could not have matured their title; and in reference to the latter the court charged the jury to answer the second issue in the affirmative if, after the streets had been opened and established, the defendants had continued in possession, exercising dominion and control over the land openly, notoriously, and adversely, claiming it as their own under known and visible boundaries for a period of twenty years. The jury found the facts to be otherwise, and returned a negative answer to the second issue. The defendants' prayer for instruction with respect to adverse possession was properly declined because it disregards altogether the time when their easement in the property was to come to an end.

There was no error in the exclusion of evidence offered to show adverse possession by Harris and Holt, two of the defendants' predecessors in title. It is elementary that the owner's title to land may be defeated by the adverse possession of an occupant and those under whom he claims for a period of twenty years, and that the privity between successive occupants which will permit the tacking of their possessions is privity of physical possession not derived from or in subordination to the true owner. *Vanderbilt v. Chapman,* 172 N. C., 809. But for obvious reasons the defendants cannot avail themselves of the proposed testimony. In their answer they admit that they went into possession and exercised the easement under the Holt deed immediately after its execution on 26 May, 1906, and they offered evidence to the effect that they had not purchased any lot on the west side of the Wilmington Seacoast Railway, but only "an easement of ingress and egress." The single claim they had was the easement; they did not assert any other title to the disputed land at the time of their entry. By the terms of the deed, in a certain event the easement was to cease. Claiming under the deed granting the easement, the defendants confirmed it; by claiming the benefits they assumed the imposed burdens; they may not assail the deed upon which at the same time they base their right of entry. *Hill v. Hill,* 176 N. C., 194; *Fort v. Allen,* 110 N. C., 183; *Fisher v. Mining Co.,* 94 N. C., 397; *Curlee v. Smith,* 91 N. C., 172; *Leach v. Jones,* 86 N. C., 404; *Grandy v. Bailey,* 35 N. C., 221. This is not a denial of their right to establish subsequent adverse possession, but it is a denial of their right to tack their subsequent possession to the alleged adverse possession of those who occupied the property previously to the entry of the defendants under the limitations of their deed. The defendants offered evidence tending to show that their possession was permissive until 1907. Their claim of subsequent adverse possession was presented to the jury by instructions in which we find no error. It is manifest from what we have said that the motion to dismiss the action was properly denied.

No error.

CLARKSON, J., dissenting: I am unable to agree with the majority opinion. I think that plaintiff's cause of action should have been dismissed. It is elementary that to enforce a contract the agreement of the parties must be certain and explicit, so that their full intention may be ascertained to a reasonable degree of certainty. In construing a contract to ascertain the intention, the setting and purpose must be considered.

Lots 23 and 24 were on Wrightsville Beach, and purchased for a summer home. These lots were on the east of the electric railroad running through Wrightsville Beach and faced and extended to the Ocean. In the rear of these lots was Banks Channel, or the Sound, used for boating by those who owned the cottage and those who came to visit by boat. The Sound was a highway by boat and necessary that these cottages have an outlet to the Sound, or highway.

Plaintiff's right of recovery was subject to the following agreement: "Also the right of way in and over the lands of the party of the first part, lying between the premises hereby conveyed and Banks Channel on the west, for the purpose of ingress and egress; but the right of way shall cease and determine whenever the party of the first part shall open and establish streets or alleys extending from Banks Channel to the Ocean, either to the north or south of the premises hereby conveyed."

Plaintiff claims title to the land described above through which defendant had ingress and egress to Banks Channel, or the Sound, from lots 23 and 24. It was to my mind clearly agreed that when defendants purchased the property they had a right of way to the channel or Sound, where they could go and come by boat—they or their friends—but it is expressly provided that "The right of way shall cease and determine whenever the party of the first part shall open and establish streets or alleys extending from Banks Channel to the Ocean, either to the north or south of the premises hereby conveyed."

Plaintiff contends he owns this property, and if he is to cut defendants off from the Sound, he cannot do this until he, or those through whom he claims, gives defendants ingress and egress by opening either an alley or street to the "north or south of the premises hereby conveyed," clearly indicating that there must be a street or alley either north or south of the land closed, which must be contiguous to the land closed, for defendants' benefit for ingress or egress to lots 23 and 24. Plaintiff, nor those through whom he claims, not having provided this street or alley contiguous to the land to be closed, which was used by defendants, for ingress or egress, cannot recover. The contract has not been performed by him or those through whom he claims. Under the contract, plaintiff, having failed to comply with the contract, had no cause of action and the court below, as a matter of law, should have so instructed the jury. The contract was not ambiguous, and this phase should not have been left to the jury as to any street elsewhere or the meaning of the contract.

The construction of the contract was a matter of law, therefore plaintiff's action should have been dismissed.

SAM WILLIAMS v. SEABOARD AIR LINE RAILWAY COMPANY ET AL.

(Filed 26 November, 1930.)

Master and Servant C d—Question of whether employer was negligent in failing to warn employee held properly submitted to jury in this case.

Where, in an action against a railroad company to recover damages for an alleged negligent personal injury, the evidence tends to show that the plaintiff had just been employed by the defendant; that he had never had experience in the work required of him, and that he was ordered, with other employees, to remove heavy rails from a car, requiring concert of action and an orderly method of work in order to avoid danger of injury, and that the defendant with the other workers had removed two rails from the car; that at the words "let's rise," they would lift the rail, walk about four feet, and at the words "knock down rail" they would drop the rail to the ground, and that when the third rail was lifted they were ordered to "knock down rail" before it was carried any distance, and that the plaintiff, expecting that the rail was to be carried to the place where the others had been dropped, and not being warned or instructed, was injured by the rail falling on his foot: *Held,* sufficient to be submitted to the jury on the question of the defendant's negligence in failing to warn and instruct the plaintiff, the plaintiff having the right to assume that the third rail would be placed where the other two had been dropped.

APPEAL by defendants from *Clement, J.,* at March Term, 1930, of MECKLENBURG. No error.

This is an action to recover damages for personal injuries sustained by plaintiff, while at work as an employee of the defendant, Seaboard Air Line Railway Company, under the orders of his foreman, the defendant, C. L. Leighton.

On 12 November, 1928, the plaintiff, an employee of the defendant, Seaboard Air Line Railway Company, was ordered by his foreman, the defendant, C. R. Leighton, to join six other employees of said company and to aid them in unloading from a car on defendant's track three heavy steel rails, to be used in repairing said track; each of said rails was 28 feet long and weighed from 790 to 795 pounds. Two of the rails were unloaded, and placed at a distance of about four feet from the car, beside the track. While plaintiff and his fellow employees were engaged in unloading the third rail, it fell on plaintiff's foot, causing him painful and serious injuries, which are permanent. As a result of his injuries, plaintiff has suffered damages.

Plaintiff alleges in his complaint that the proximate cause of his injuries was the negligence of the defendants. Among others, the acts of negligence alleged in the complaint are as follows:

"(a) In that the defendants did not warn the plaintiff of the danger incident to his work, and did not promulgate proper rules, orders, directions and instructions."

"(e) In that the defendant, Seaboard Air Line Railway Company, its agents, and employees, failed and neglected to notify this plaintiff of the time and place where the said heavy rail would be turned loose and dropped."

At the time he was injured, plaintiff was about twenty years of age. He had not previously worked for the defendant, or for any other railroad company. He was first employed by the defendant as a laborer on the day before he was injured. With respect to the manner in which he was injured, the plaintiff testified as follows:

"I started to work for the railroad company on Monday morning, 12 November, 1928, at 7 or 7:30 o'clock. I worked during the morning with another boy, lifting rails out of a ditch, and putting them up on the side of the railroad. About dinner time Mr. Leighton called me and told me to go ahead and help take the rails off the car. He did not give me any instructions about how the work of unloading the rails was done. He did not tell me about any signals. He just told me to go ahead and help the others unload. I fell in with the crowd and helped them lift the rails from the car, and take them to the place where they were thrown down. The crowd just grabbed hold of them. The car had three rails on it, one right close to the end, another here, and another here (indicating). We picked up the first rail, and walked with it about four feet. We then threw it down in the ditch beside the railroad. When we took hold of the first rail, some one said, 'Let's rise,' and we all lifted it up. When we had walked the distance of about four feet from the car, some one said, 'Knock down rail.' We then threw the rail into the ditch. There were seven men engaged in this work—six others and I. After we threw the first rail down, we went back to the car and got the second rail. We just see-sawed that rail until we got it to the end of the car. The caller then hollered, 'All right, let's rise.' We then lifted the rail from the car, and walked to where we had thrown down the first rail. The caller said, 'All right, knock down rail.' When we had thrown the second rail down, we went back to the car for the third rail. We see-sawed the third rail, until we got it to the end of the car. All of us were hollering and singing, saying, 'Let's rise.' I was thinking they were going to carry it to where we had thrown down the other two rails. When they got to the end of the car, they hollered, 'Knock down,' and the rail just fell on my foot. I had not made a step. No one told me that the third rail was to be put in a different place from the other two. It was dropped about four feet from where the other rails were thrown down. It was dropped on the ends of the crossties. I had hold of the rail, and tried to keep it from falling on me when the others turned loose. The rail hit across the ankle of my foot, which was on the crosstie."

The evidence for the defendant tended to show that plaintiff heard the signals given by the caller and understood their meaning. Plaintiff, upon being recalled, testified that he did not hear the signal, "knock down," after the third rail was lifted from the car, and kept his hands on the rail after the others had turned the rail loose because he thought it was to be taken to the place where the other rails had been thrown down. Instead of this, the third rail was thrown down at the end of the car.

From judgment on the verdict that plaintiff recover of the defendants the sum of $2,500, the damages assessed by the jury, the defendants appealed to the Supreme Court.

Shore & Townsend and James W. Osborne for plaintiff.
Cansler & Cansler for defendant.

CONNOR, J. The question as to whether the work which the plaintiff in the instant case was required to do, was simple, requiring no special instructions from the defendants as to the manner in which or the method by which it should be done, upon all the evidence offered at the trial, was not a question of law, and for that reason was properly submitted to the jury. There was evidence tending to show that it was a dangerous work, requiring for its performance, with reasonable safety to themselves, men of experience and skill. The rails which the plaintiff was ordered to assist in unloading were 28 feet long and weighed from 790 to 795 pounds each. They were on a car on defendant's track, and were to be used in repairing the track. Plaintiff and his fellow-employees were required not only to unload these rails, but also to place them along the track, at a convenient distance from the place where they were to be used. By reason of the length of the rails and of their weight, defendant's foreman ordered seven men to do the work, which required the concerted action of them all. Under these circumstances, it was the duty of the defendant railroad company and of its foreman, in charge of its employees, to adopt some reasonably safe manner and method of doing the work, and to instruct each of the employees to do the work, as to the manner adopted and the method to be pursued. The evidence shows that when the rail was in place on the car to be unloaded, in order to have concert of action, and thereby the full strength and skill of all the employees, one of them called, "Let's rise," and thereupon each man was expected to exert his full strength in lifting the rail; when the rail had been taken by the employees to the place where it was to be thrown down, in order that the employees engaged in the work might act in concert, the caller said, "Knock down rail," and then each man loosed his hold on the rail, all acting together. It is manifest that if one of the men engaged in this work did not understand the signals, he would not, ordinarily, act in concert with the others, and that his failure to do so might result in injury to himself or to some of his fellow-employees. It was therefore the duty of the defendant railroad company and of its foreman, not only to adopt and pursue some manner in which and some method by which the work should be done with reasonable safety, but also to instruct each of its employees both as to such manner and as to such method. This duty was especially insistent in the instant case, on account of the age and inexperience of the plaintiff. Failure to perform this duty was negligence, and if such negligence was the proximate cause of plaintiff's injuries, defendants are liable to plaintiff for the damages resulting from his injuries.

Conceding that from all the evidence the jury could have found that plaintiff understood the signals, and appreciated the importance of acting upon them, having assisted in unloading and placing two of the rails before he was injured, we think that there was evidence tending to show that plaintiff as a reasonably prudent man relied upon the fact that both the first and second rail unloaded had been thrown down at a distance of at least four feet from the car, and that without warning to the contrary, he was justified in thinking that the third rail would likewise be carried that distance before it was thrown down by his fellow-employees. Under the circumstances which all the evidence tended to show, it was negligence for the defendant railroad company and its foreman to fail to warn the plaintiff that the third rail would not be placed in the same or in a similar position as the first two rails, and if this negligence was the proximate cause of his injuries, plaintiff is entitled to recover in this action. *Helton v. Ry. Co.* (Ky.), 283, S. W., 395; *Stevens v. Hines* (Mont.), 206 Pac., 441; *Reid v. Dickinson* (Ia.), 169 N. W., 673; *Cules v. Ry. Co.* (Wash.), 177 Pac., 830.

Defendants' assignment of error based upon their exceptions to the refusal of their motion for judgment as of nonsuit, at the close of all the evidence, and of their prayers for peremptory instructions to the jury on the issues involving defendant's liability to plaintiff, cannot be sustained. There was no error in the submission of the evidence in this case to the jury. The verdict is supported by the evidence, and the judgment is affirmed.

No error.

STATE v. T. J. HORTON.

(Filed 26 November, 1930.)

False Pretense A a—Indictment under C. S., 4283 must charge an intent to defraud or deceive.

In order to convict a defendant under the provisions of C. S., 4283, for obtaining property in return for a worthless check, the indictment must sufficiently charge an intent to cheat or defraud or that the defendant obtained a thing of value, chapter 14, Public Laws of 1925, which is ineffectual, and chapter 62, Public Laws of 1927, not being in effect at the time of the alleged offense, are not considered.

APPEAL by defendant from *Johnson, Special Judge,* at the May Criminal Term, 1930, of MOORE. Reversed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

R. O. Everett and H. F. Seawell, Jr., for defendant.

PER CURIAM. The defendant was convicted for obtaining property in return for a worthless check in breach of C. S., 4283. It is unnecessary to consider either chapter 14, Public Laws 1925, which is not in effect, or chapter 62, Public Laws 1927, because it went into effect after the offense is alleged to have been committed.

C. S., 4383, is as follows: "Every person who, with intent to cheat and defraud another, shall obtain money, credit, goods, wares or any other thing of value by means of a check, draft or order of any kind upon any bank, person, firm or corporation, not indebted to the drawer, or where he has not provided for the payment or acceptance of the same, and the same be not paid upon presentation, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, at the discretion of the court. The giving of the aforesaid worthless check, draft, or order shall be prima facie evidence of an intent to cheat and defraud."

The defendant in apt time moved to dismiss the action; the motion was overruled, and the defendant excepted and appealed.

The defendant's motion should have been allowed. The warrant does not sufficiently charge either an intent to cheat and defraud or that the defendant obtained anything of value by means of the check. *S. v. Freeman,* 172 N. C., 925; *S. v. Edwards,* 190 N. C., 322. Judgment

Reversed.

LILLIE JONES v. LIFE AND CASUALTY COMPANY OF TENNESSEE.

(Filed 26 November, 1930.)

Insurance M b—Burden is on plaintiff in action on accident policy to prove that death was result of cause stipulated therein.

In order to recover upon a policy of casualty insurance providing for liability if the insured should be killed by a motor-driven vehicle while walking or standing on a public highway, the burden of proof is on the plaintiff to show by evidence the liability of the defendant according to the terms of his policy, and evidence that the insured was found dead on the public streets of a city, with bruises on his body, etc., is insufficient to overcome defendant's motion as of nonsuit.

APPEAL by plaintiff from *Clement, J.*, at August Term, 1930, of CABARRUS. Affirmed.

This is an action to recover on a policy of insurance by which defendant agreed to pay to plaintiff, as beneficiary, the sum of $1,000, upon the death, during the time the policy was in force, of Fred J. Jones, the insured, resulting from bodily injuries:

"If the insured shall be struck by a vehicle which is being propelled by steam, cable, electricity, naphtha, gasoline, horse, compressed air or liquid power, while insured is walking or standing on a public highway, which term, public highway, as here used shall not be construed to include any portion of railroad or interurban yards, station grounds, or right of way except where crossed by a thoroughfare dedicated to and used by the public for automobile or horse vehicle traffic."

From judgment dismissing the action, on motion of defendant at the conclusion of the evidence for the plaintiff, plaintiff appealed to the Supreme Court.

B. W. Blackwelder for plaintiff.
Hartsell & Hartsell for defendant.

PER CURIAM. The dead body of Fred J. Jones, the insured, was found on a public street in the city of Lexington, N. C., about 8 o'clock, on the night of 9 January, 1929. The policy sued on in this action was then in force. There was no evidence, however, at the trial of this action from which the jury could have found that he had been struck by a vehicle while walking or standing in the street. There were wounds on his body showing injuries sufficient to have caused his death. There was no evidence tending to show how or by whom these injuries were inflicted. In the absence of evidence tending to show that the insured was struck by a vehicle and that the fatal injuries were thereby inflicted, there was no error in the judgment dismissing the action as of nonsuit. The burden was on the plaintiff to show by evidence that defendant is liable to her under the terms of the policy. This she failed to do. The judgment must, therefore, be

Affirmed.

E. Y. DENNY AND WILLIE WILLARD v. O. E. SNOW, GUARDIAN OF LEE HILL, AND LEE HILL AND O. E. SNOW, ADMINISTRATOR OF THE ESTATE OF LEE HILL.

(Filed 26 November, 1930.)

Evidence N b—Where evidence raises merely conjecture or suspicion it is insufficient to be submitted to the jury.

In order to recover damages of defendant for the wilful burning of plaintiff's barn and contents, it is required that the evidence raise more than a conjecture or surmise, and that it be more substantial than a mere scintilla.

APPEAL by defendant from *Johnson, Special Judge,* and a jury, at March Term, 1930, of SURRY. Reversed.

This is a civil action brought by plaintiffs against defendant, O. E. Snow, guardian of Lee Hill, who it appears has died and O. E. Snow was duly appointed administrator of his estate. The complaint alleges: "That on or about 10 September, 1929, the defendant, Lee Hill, did maliciously and/or wilfully and/or negligently set fire to and cause to burn and permit to burn said dwelling-house then occupied by the plaintiff, and did, maliciously and/or wilfully and/or negligently thereby wholly destroy the personal property of the plaintiff, consisting of household and kitchen furniture and all personal property and tobacco then and there stored and packed away in said dwelling-house."

The house burned was the property of the plaintiff, E. Y. Denny, and the personal property burned was that of his tenant, Willie Willard. O. E. Snow was duly appointed guardian of Lee Hill, who was duly declared insane. It appears that he is dead and that O. E. Snow was duly appointed his administrator. By consent of the parties, the cases were consolidated. Defendant denied the allegations of the complaint.

The issues submitted to the jury and their answers thereto were as follows:

"1. Did the defendant, Lee Hill, set fire to and thereby destroy the property of the plaintiff, as alleged in the complaint? Answer: Yes.

2. If so, what amount is the plaintiff, E. Y. Denny, entitled to recover as damages on account thereof? Answer: $387.50.

3. If so, what amount is the plaintiff, Willie Willard, entitled to recover as damages on account thereof? Answer: $262.50."

H. O. Woltz and R. A. Freeman for plaintiff.
Folger & Folger for defendant.

PER CURIAM. At the close of plaintiff's evidence and at the close of all the evidence, the defendant made motions in the court below for judgment as in case of nonsuit. C. S., 567. We think the motions should have been granted.

From a careful review of the evidence, we do not think it is of sufficient probative force to have been submitted to the jury. It raised a suspicion, a conjecture, a guess, a surmise, a speculation, but there must be more than this, more than a scintilla of evidence, to take a case to the jury, and we do not find it on this record.

"A verdict or finding must rest upon facts proved, or at least upon facts of which there is substantial evidence, and cannot rest upon mere surmise, speculation, conjecture, or suspicion. There must be legal evidence of every material fact necessary to support the verdict or finding, and such verdict or finding must be grounded on a reasonable certainty as to probabilities arising from a fair consideration of the evidence, and not a mere guess, or on possibilities." 23 C. J., pp. 51-52. *S. v. Johnson, ante,* 429.

We see no reason to set forth the evidence. It was fully discussed and the case ably argued on the hearing. We have gone into the record fully and thoroughly, mindful of the fact that a jury has passed on the evidence, but with the responsibility resting on us we cannot say the evidence, which was wholly circumstantial, was sufficient for the court below to have submitted it to the jury. The judgment below is

Reversed.

LEE WILLIAMS v. ROWLAND LUMBER COMPANY.

(Filed 26 November, 1930.)

Appeal and Error E b—Where charge to jury does not appear in record it is presumed correct.

Where the charge of the court is not set out in the record on appeal its correctness is presumed, and where the evidence, not excepted to, is sufficient to sustain the verdict, which is determinative of the rights of the parties, the judgment will be affirmed.

CIVIL ACTION, before *Midyette, J.*, at January Term, 1930, of DUPLIN.

The plaintiff alleged and offered evidence tending to show that he was employed by the defendant as a laborer in logging operations; that the logs were pulled out of the woods by a skidder; that he was instructed to unfasten the cable from the end of a log and that, while attempting to do so, the skidder was suddenly started without notice, causing the log to be jerked with such force as to swing it to one side, striking the plaintiff and producing serious and permanent injury.

The defendant denied the allegations of negligence, and alleged that, while it owned the skidder, the plaintiff was an employee of one James, an independent contractor for whose negligence, if any, the defendant was not liable. The defendant further pleaded contributory negligence.

The jury found that James, who employed the defendant, was not an independent contractor, and that plaintiff was injured by the negligence of defendant and did not by negligence contribute to his own injury, and assessed the damages at $500.

From judgment upon the verdict, the defendant appealed.

Oscar B. Turner for plaintiff.
Beasley & Stevens for defendant.

PER CURIAM. There is no exception to evidence introduced at the trial; neither is there any exception to the charge of the court. Indeed, the charge does not appear in the record, and therefore it is presumed that the trial judge charged correctly upon all the issues. There was sufficient evidence to be submitted to the jury, and the verdict is determinative of the rights of the parties.

Affirmed.

GEORGE MERRITT v. CHARLOTTE PIPE AND FOUNDRY COMPANY, A CORPORATION.

(Filed 26 November, 1930.)

Master and Servant C b—Evidence in this case held insufficient to be submitted to jury in action to recover against employer.

Where the evidence tends only to show that the plaintiff was an experienced employee and that, in the course of his employment, he was loading a dinky car with scrap iron to be conveyed from a railroad track to a furnace in which it was used, that he was furnished with a proper implement, that he himself selected the pieces of scrap for loading, and that, while examining a heavy piece of scrap to see if it was secure, another piece fell on him causing the injury in suit, that in performing this service he was left to his own manner or method, and there is no evidence of any act of his employer which was responsible for the injury: *Held*, defendant's motion as of nonsuit was properly granted.

APPEAL by plaintiff from *Clement, J.*, at May Term, 1930, of MECKLENBURG. No error.

This is an action for actionable negligence brought by plaintiff against defendant. The defendant denied negligence, and set up the plea of contributory negligence. The evidence was to the effect that plaintiff had been an employee of defendant for three years prior to the time he was injured, 19 June, 1930. Among plaintiff's duties was that of loading scrap iron from a scrap pile on a dinky car. This dinky car ran on a track and was operated by hand, and was about as large as a one-horse wagon. Defendant had three employees for this purpose. The plaintiff usually had two helpers to do this work, and on the day the injury occurred, about 12 o'clock, one had gone to dinner. The scrap iron was placed on the dinky car and taken a short distance and put in a cubilo to be melted. The scrap iron was brought in defendant's yard by the railroad on a side track, and unloaded. The place where the scrap iron was thrown out from the railroad car, in the yard of the defendant, was a weatherboarded shed about five feet high, which was to keep the scrap iron from falling on the railroad track, when it was thrown in the shed it scattered everywhere.

The plaintiff, on cross-examination, testified, in part: "When you bring that dinky car up to the edge of the scrap which is scattered all around there, it is loaded and they carry it down and empty it in the furnace. That is just about as far as from here to the back end of the court-room. As you pile this scrap lying around the pile on the dinky car, then the dinky car moves a little farther on the track and keeps moving along as you work on the scrap pile. You bring the little dinky car up to near the scrap pile, as near as you can bring it, then you pick up the scrap and pile on there and empty it, and then you move it a little farther to the back part of the scrap pile, and can pick up stuff as you move it along and haul it to the furnace. We pick up larger scrap when we want it quick, and when the larger scrap is there we pick it up. . . . On this occasion, Sam Worley was there with me. We were both picking scrap and putting it on the dinky car, him on the left side and me on the right. I saw a big piece pretty high upon the scrap pile and I reached to feel of it to see if it was substantial. I took my hook and pushed it to see if it would fall, and when I pushed it, it did not fall. That piece was safe up there. It was not loose. At that time another piece fell out of the scrap pile and struck me, and knocked me back and caused me to get hurt. I did not have a piece of iron in my hands when it hit me, but did have my hook in my hand. That hook was furnished me for the purpose of hooking scrap pieces out of the pile. I know I had a hook. I think Sam Worley had a pitchfork. The piece that pulled out and hit me was one of these pipes, these old-time heater pipes. It was heavy enough, and if it had been any heavier I don't know whether it would have done any more injury or not. It bruised my leg. I fell back after it struck me. I believe it weighed 90 to 100 pounds. I had been working there about three years, and had been doing this same kind of work the whole time I was there. I understood how to load scrap iron on the dinky car. We knew the job. Sometimes would not see the boss man unless we went to him and needed some help. That was just a part of my job like it was some one else's job, and like Will Worley's job, to load that up, and I went there and did it. No one stood there and told me what piece to put on the dinky. I used my own head about what piece to take up and put on. If a piece was too large for me to put on myself, of course I would call Sam or Will to help me. I would use my own head about which piece to put on the dinky car. I would reach down and get them. No one told me which piece to pull out. I didn't pull out any piece. If I could handle it, I would handle it, and if too large would get them to help me. No one told me what particular piece to put on. I decided that myself."

Jimison & Abernathy for plaintiff.
Ralph V. Kidd and Stewart & Bobbitt for defendant.

PER CURIAM. The defendant, at the close of plaintiff's evidence and at the close of all the evidence, made motions for judgment as in case of nonsuit. C. S., 567. The court below, at the close of all the evidence, sustained defendant's motion for nonsuit, and in this we see no error.

In *Allen v. Lumber Co.,* 181 N. C., at p. 505-6, is the following: "A perusal of our decisions will show that in order for liability to attach, in a case of simple, ordinary, everyday employment, and where the laborer is allowed to exercise his own judgment as to how the work should be done, it must appear, among other things, that the injury has resulted from some omission or defect which the employer is required to fulfill or remedy, in the proper and reasonable discharge of his duties, and that the omission or defect complained of and made the basis of the charge is of a kind from which some appreciable and substantial injury might be expected to occur when tested by the standard of reasonable prudence and foresight. *Winborne v. Cooperage Co.,* 178 N. C., 88, and cases cited." *Simpson v. R. R.,* 154 N. C., 51, is similar to the case at bar.

Defendant furnished a suitable hook with which to do the work and competent fellow-workmen, and from the evidence it would seem that plaintiff made, and as it were, carried his own place of work with him, and used his own judgment as to the method of doing it. We find in law

No error.

STATE v. DOCK HEFNER, CECIL HEFNER AND CHARLIE WARREN.

(Filed 3 December, 1930.)

1. **Assault B a—Elements of offense of assault with deadly weapon with an intent to kill.**

   In order for a conviction of crime under the provisions of C. S., 4214, there must be a charge and evidence thereon of five essential elements: an assault, the use of a deadly weapon, the intent to kill, infliction of serious injury, death not resulting, and *Held:* while an assault does not necessarily include a battery, where serious injury is inflicted a battery is necessarily implied.

2. **Same—Evidence of infliction of serious injury held sufficient in this case.**

   Evidence that several defendants indicted under the provisions of C. S., 4214, were discovered selling liquor in violation of our prohibition law, and that they were armed with pistols and blackjacks and acted in concert, and that one of them threatened the life of the officer attempting to arrest them, and that the others participated by carrying the officer to a room of a garage where they beat him with a blackjack into unconsciousness, and carried him out into a field and left him there where later and alone he recovered consciousness, is sufficient for the conviction of them all of an assault with a deadly weapon with intent to kill, resulting in serious injury, in violation of the statute.

3. **Same—Evidence of use of deadly weapon held sufficient in this case.**

   Where the evidence against the defendants, tried under an indictment for violating C. S., 4214, tends to show an assault with a blackjack and other like instruments whereby they beat the one assaulted into unconsciousness and carried him into a field where alone he eventually recovered consciousness, is sufficient as to the use of a deadly weapon in making the assault.

4. **Criminal Law L e—Error in instruction in this case held to be harmless under the evidence, and defendant not entitled to new trial therefor.**

   Where the evidence is sufficient of an assault with a deadly weapon with intent to kill, not resulting in death, a charge by the judge to the jury that "serious injury" included "anything that would cause a breach of the peace," is held not to be reversible error to the defendant's prejudice where all the evidence tends to show that serious injury was inflicted in violation of the statute.

5. **Criminal Law I j—Where evidence tends to show at least guilt of lesser degree of offense charged a motion of nonsuit is properly denied.**

   Where the defendants are tried for violating C. S., 4214, in making an assault with a deadly weapon with intent to kill, etc., the action will not be dismissed when the undisputed evidence tends to show the assault was made with a deadly weapon.

APPEAL by defendants from *Stack, J.*, at February Term, 1930, of CATAWBA. No error.

The defendants were indicted and convicted under C. S., 4214, for an assault on Carroll Barringer with intent to kill and the infliction of serious injury not resulting in death. At the trial they neither testified nor introduced any witness in their behalf. The evidence for the State tended to show the following circumstances: Barringer was a deputy sheriff of Catawba County. After a conference between Sheriff Beal and Mrs. Candace Shook, she, her son, and Barringer went in a car from Newton to Hickory on the evening of 21 April, 1929. They arrived at Hickory about 7:30 and went to the garage of the defendant, Dock Hefner. All the defendants were there. Mrs. Shook told Dock she wished to buy five gallons of whiskey, and he promised to have it there in 25 or 30 minutes. Dock and Cecil went away in a car and within half an hour returned with a wooden-covered five-gallon can, which Dock and Charlie Warren put in Mrs. Shook's car. Cecil Hefner backed the other car out of the building. When he returned Barringer showed the defendants his official badge and told them he would have to arrest them. Dock Hefner and Warren "flew into a passion." Dock said, "Look what the ………… brought in here with her. Kill the …… ……." He then took the can from Mrs. Shook's car, put it in another, and carried it from the building. Returning, he again cried out, "Kill the …………" Mrs. Shook "left there." Standing near by, Warren drew a pistol on Barringer and inquired, "Now, …… …, what do you think of this?" Barringer seized Warren's right wrist with his left hand and Warren caught Barringer's right arm with his left hand. Dock remarked, "We will take him into the back room and kill him." While Warren pulled, Dock and Cecil pushed Barringer into the back room. Dock took a blackjack from the blanket of a cot; Cecil took hold of Barringer's pistol; Warren and Barringer released each other; and Dock got a double-barreled shotgun and loaded it. One of the defendants said, "Now run, …………, if you think anything of your life, run d——n fast." At that time Dock had his gun drawn and Warren had his pistol drawn on Barringer. Dock suggested that he "get that …… automobile and get out of here." As Barringer went to the car Dock used this language: "Leave that car here? Hell, no, we won't let him get out of here. I am going to kill the ………… right here." Thereupon Dock struck him on the right cheek with his hand and on the left side of his head with a blunt instrument, and then took from the floor a piece of timber an inch thick, an inch and a half wide, and about two and one-half or three feet long. What followed, Barringer could not relate. He lost consciousness, and when he recovered in half an hour later he was among weeds and grass in a vacant lot 200 yards from the garage. He did not know how he got there. He found a wound on his ear, on the back of his head, and on his left hand; his flesh and skin had been torn off and his back had been sprained. For several days he suffered from his injuries.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. L. Murphy and Wilson Warlick for defendants.

ADAMS, J. Section 4214 of the Consolidated Statutes is in these words: "Any person who assaults another with a deadly weapon with intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony and shall be punished by imprisonment in the State prison or be worked on the county roads for a period not less than four months nor more than ten years."

The essential elements of the offense therein denounced are (1) an assault (2) with a deadly weapon (3) with intent to kill and (4) the infliction of a serious injury (5) not resulting in death.

An assault is an offer or attempt by force or violence to do injury to the person of another. While every battery includes an assault every assault does not include a battery; but an assault inflicting serious injury necessarily implies a battery, which is the unlawful application of force to the person of another by the aggressor himself, or by some substance which he puts in motion.

Shotguns and pistols *ex vi termini* import their deadly character, and the blackjack described by the witnesses may appropriately be classed among weapons which are likely to produce death or great bodily harm. *S. v. Collins*, 30 N. C., 407; *S. v. West*, 51 N. C., 505.

That there is evidence of an intent to kill there can be no doubt. Dock Hefner not only declared his purpose to take Barringer's life; he admonished his companions and allies to perpetrate the deed. All the defendants were acting in concert. The record, then, discloses ample evidence of an assault by the defendants with deadly weapons and with intent to kill.

The defense is founded upon two propositions: It is contended, in the first place, that the victim of the assault suffered only superficial injuries and none which can reasonably be deemed "serious" in contemplation of law. Considered in the light of the previous decisions of this Court, the injuries inflicted by the assault cannot be classified as superficial or trivial, or, indeed, as free from the gravest possibilities. In cases involving the question of "serious damage" or "serious injury" this Court has laid stress on the fact that the person assaulted suffered great bodily pain. In *S. v. Roseman*, 108 N. C., 765, it was held that serious damage had been done by an assault on a woman with a whip which cut into her flesh; in *S. v. Shelly,* 98 N. C., 673, by an assault which had stunned the victim, addled his brain, and injured his eyes; and in *S. v. Huntley,* 91 N. C., 617, by an assault causing physical pain which was "severe for a day or two and more or less severe for several days," although the Court seems to have considered also the mental suffering of the injured party, who was the assailant's wife.

In the present case the evidence tends to establish the fact that the defendants assaulted the officer with such violence as to leave him bruised and wounded and to deprive him of consciousness, and then carried him from the garage to a vacant lot two hundred yards away and left him there in the grass and weeds, probably under the impression that his death was a matter of moments. To say that such physical injury was not serious would be altogether inconsistent with former decisions dealing with the question. In the cases last cited the crucial term was "serious damage" as used in the statute relating to the criminal jurisdiction of justices of the peace (Code, 892; Revisal, 1427; C. S., 1481); but in *S. v. Earnest,* 98 N. C., 740, "serious damage" and "serious injury" were considered as synonymous terms. At any rate, as suggested in the State's brief, in enacting sections 1481 and 4214 of the Consolidated Statutes the General Assembly did not have in mind the distinction recognized in civil actions between *"damnum"* and *"injuria."*

In the second place the defendants contend that his Honor committed error by instructing the jury that "serious injury" means not only injury to the party assaulted, but "anything that would cause a serious breach of the peace." Similar language was used in *S. v. Huntley, supra;* but in *S. v. Strickland,* 192 N. C., 253, it was held that an inaccurate definition of the term will not be held for reversible error if upon all the evidence it clearly appears that serious injury was inflicted. To warrant reversal, error must be prejudicial. *S. v. Smith,* 164 N. C., 475; *S. v. Reagan,* 185 N. C., 710.

The trial court was correct in holding that the action should not be dismissed. If the injury was not serious or there was no intent to kill, as contended by the defendants, there remained undisputed evidence of an assault with deadly weapons. *S. v. Earnest, supra.*

No error.

IN RE WILL OF MRS. S. A. LOWRANCE, DECEASED.

(Filed 3 December, 1930.)

Wills C d—Printed date, name and place on letter-head will not invalidate paper-writing otherwise sufficient as holographic will.

It is not required by our statute that a holographic will be dated or the place of its execution stated therein, and where printed words, unrelated to the subject-matter of the paper-writing, are found on the paper used for the purposes of a will and the written part clearly and unmistakably disposes of the estate to designated persons and is in the handwriting of the testator with her signature affixed, and is found after her death on two unattached sheets of paper in a sealed envelope marked as her will, in a place where her valuable papers were kept by her, and these are established as a fact by the jury upon sufficient evidence in such matters, the printed words on the paper are regarded as surplusage, and a judgment below sustaining the entire written part as a valid holographic will will be sustained on appeal in the absence of evidence of fraud or undue influence.

APPEAL by caveator from *Shaw, J.*, at May Term, 1930, of IREDELL. No error.

This is a proceeding for the probate in solemn form of a paper-writing propounded as the last will and testament of Mrs. S. A. Lowrance, deceased. The paper-writing was probated in common form by the clerk of the Superior Court of Iredell County, on 26 July, 1928. Upon the filing of a caveat by an heir at law of the deceased, the cause was transferred to the civil issue docket of said court for trial of the issue raised by the caveat.

The issue submitted to the jury was answered as follows:

"Is the paper-writing propounded by Mrs. Mame Houston and consisting of two sheets, marked propounder's Exhibits B and C, and every part thereof, the last will and testament of Mrs. S. A. Lowrance, deceased?

"Answer: Yes, except the words printed on the two sheets."

Thereupon judgment was rendered that the paper-writing propounded and every part thereof except the printed words, "S. A. Lowrance" between the words "Mrs." and "made," in the first line of Exhibit C, and the printed words "Mooresville, N. C., ..., 192....," in the date line on Exhibit B, is the last will and testament of Mrs. S. A. Lowrance, deceased; it was ordered that said paper-writing be and the same was probated and recorded as such last will and testament.

From said judgment the caveator, R. G. Thomas, appealed to the Supreme Court, assigning errors based on exceptions noted during the trial.

A. L. Starr and Greer, Greer & Joyner for propounder.
O. S. Thacker and E. M. Land for caveator.

CONNOR, J. Mrs. S. A. Lowrance died in Mooresville, N. C., on 7 July, 1928. She had lived in Mooresville for many years, and at her death was eighty years of age. She had been a widow since 1925 and had no children. After the death of her husband, Mr. and Mrs. J. B. Houston looked after her. Neither Mr. nor Mrs. Houston was related to her by blood or marriage. They lived next door to Mrs. Lowrance, and the evidence tended to show that the relationship between Mrs. Lowrance and Mrs. Houston was close and intimate. Mrs. Lowrance constantly called on Mrs. Houston for companionship, and relied on her almost daily. Mrs. Houston saw Mrs. Lowrance practically every day, and responded to every call made on her by Mrs. Lowrance. During the latter's illness, which has been almost continuous since her husband's death, Mrs. Houston was at all times attentive to her. Mrs. Houston, named therein as "Mame Houston," is the propounder of the paper-writing offered in this proceeding for probate as the last will and testament of Mrs. Lowrance.

R. G. Thomas is a nephew of Mrs. S. A. Lowrance and as such is one of her heirs at law. He resides in the State of Florida, but had been in Mooresville for four or five days preceding the death of Mrs. Lowrance. A few days before her death, he was notified of her illness by Mrs. Houston, and in response to such notice, came to Mooresville and remained there until the death of Mrs. Lowrance. He is the caveator in this proceeding.

After the death of Mrs. Lowrance, an envelope, on which were written in the handwriting of Mrs. Lowrance the words, "My Will," was found in the drawer of a roll-top desk in her house. This desk had been used by Mr. Lowrance, and after his death, by Mrs. Lowrance. The drawer in which the envelope was found, contained valuable papers of Mrs. Lowrance. When the envelope was opened, two sheets of paper were found therein. They were folded together, but were not attached, the one to the other. Both Mrs. Houston and Mr. Thomas were present when the envelope was found, and when it was opened.

The two sheets of paper, with the writing thereon, found in the envelope, were propounded by Mrs. Houston as the last will and testament of Mrs. S. A. Lowrance.

The words appearing on the first sheet of paper, marked Exhibit C, are as follows:

"Will of Mrs. (S. A. Lowrance) made 2 March, 1928. (West Center Avenue.)

Will begin in my room—I want Oni Houston to have my oak suit, and *our* clock, everything except my little dest. Want Julia Saser to have it, all the pictures she wants."

The words appearing on the second sheet of paper, marked Exhibit B, are as follows:

"(Mooresville, N. C.) 1928 (192....).

I will leave Mame Houston and her heirs all I have and house on Center Street.

MRS. S. A. LOWRANCE."

The words appearing above in parentheses, to wit, on the first sheet, "S. A. Lowrance," and "west Center Avenue," and on the second sheet, "Mooresville, N. C.," and "192...." are printed; all the other words on both sheets are written. The evidence shows that the sheets of paper with the words "S. A. Lowrance," "west Center Avenue," and "Mooresville, N. C. ....192....," were letter-heads owned by the deceased husband of Mrs. S. A. Lowrance.

The propounder offered three witnesses, each of whom testified that he knew the handwriting of Mrs. S. A. Lowrance, and that he verily believed that all the words on said two sheets of paper, in writing, are in her handwriting.

By his assignments of error based on his exceptions to the refusal of the court to give certain instructions to the jury as requested by him in apt time, and also to certain instructions as given by the court to the jury, in the charge, the caveator presents to this Court his contention that the paper-writing, consisting of the two sheets of paper offered in evidence by the propounder, and propounded for probate as the holograph will of Mrs. S. A. Lowrance, deceased, is not her will, for that as shown by all the evidence, all the words appearing on said two sheets of paper are not in her handwriting.

The statute in this State provides that a paper-writing, sufficient in form to constitute a last will and testament, must be probated as the holograph will of a deceased person, (1) where such paper-writing was found, after the death of such person, among his valuable papers and effects, and (2) where such paper-writing is in the handwriting of the deceased person whose will it purports to be, with the name of such person subscribed thereto, or inserted in some part thereof, provided such handwriting shall be proved by three credible witnesses, who state, under oath, that they verily believe that the paper-writing and every part thereof is in the handwriting of the deceased person, whose will it appears to be. Such paper-writing, when duly probated, as required by statute, is sufficient, as a holograph will, to give and convey both real and personal property. C. S., 4131, and C. S., 4144, sec. 2.

In *Alexander v. Johnston,* 171 N. C., 468, 88 S. E., 785, it is said by *Allen, J.:* "The purpose of the statute is to enable persons who cannot procure the assistance of others in the preparation of a will, or who are not inclined to make known prior to death what disposition has been made of their property, to execute a valid will by a paper in their own handwriting and without the formal attestation of witnesses, and the formalities as to execution are intended to effectuate this purpose and not to defeat it. The paper must be found after death among the valuable papers of the deceased, or deposited with some person for safe-keeping. This is to furnish evidence that the deceased person attached importance to the paper as a testamentary disposition, and to lessen opportunity for fraud or imposition. The paper must be in the handwriting of the deceased. This is to identify the testator, and to form the causal connection between the writer and the writing and to prevent the possibility of change and alterations without the consent of the testator. The name of the testator must be subscribed to the paper or inserted in some part thereof, and this is also for identification of the testator, and to furnish evidence of the paper being a completed instrument."

In re Jenkins' Will, 157 N. C., 429, 72 S. E., 1072, it is said by *Walker, J.:* "The provisions of the statute are, of course, mandatory and not directory, and therefore there must be a strict compliance with them, before there can be a valid execution and probate of a holograph script as a will; but this does not mean that the construction of the statute should be so rigid and binding as to defeat its clearly expressed purpose. It must be construed and enforced strictly, but at the same time reasonably."

Upon these well settled principles, the contention of the caveator in the instant case cannot be sustained. When all the words appearing on a paper in the handwriting of the deceased person are sufficient, as in the instant case, to constitute a last will and testament, the mere fact that other words appear thereon, not in such handwriting, but not essential to the meaning of the words in such handwriting, cannot be held to defeat the intention of the deceased, otherwise clearly expressed, that such paper-writing is and shall be his last will and testament. There is no statutory requirement in this State that the holograph script shall be dated or shall show the place where it was executed by the testator. The words in print appearing on the sheets of paper propounded in the instant case are surplusage. They are not essential to the meaning of the words shown by three credible witnesses to be in the handwriting of Mrs. S. A. Lowrance. These words, without the printed words, are sufficient to constitute a testamentary disposition of property, both real and personal.

The cases from other jurisdictions, cited and relied on by the caveator, do not, in view of differences in statutory requirements, control in the instant case. There was no error in the trial in the Superior Court. The refusal of instructions as requested by the caveator, and the instructions given by the learned judge who presided at the trial, are well supported by the statutes in this State, and by authoritative decisions of this Court. The printed words were properly eliminated by the verdict and by the judgment, and only the words on the two sheets of paper, in the handwriting of Mrs. S. A. Lowrance, were probated as expressing her last will as to the disposition of her property, after her death. The judgment is affirmed.

No error.

B. A. KEIGER v. SOUTHERN PUBLIC UTILITIES COMPANY, JOHN LEDFORD, AND J. A. WOFFORD.

(Filed 3 December, 1930.)

Street Railroads B c—In this action by prospective passenger, evidence of negligence of street car company held insufficient.

A street car company owes no duty as a carrier to one who intends to take the car as a passenger until the prospective passenger has received some recognition from the motorman in answer to his signal for that purpose, and where the evidence tends only to show that such person was injured by being struck by an automobile about sixty feet after the automobile had passed the street car as the pedestrian was crossing from the curbing of a fifty-foot street to the car track, before daylight, intending to board the street car, it is insufficient to be submitted to the jury as to the street car company's liability on the question of negligence and proximate cause, and a judgment as of nonsuit thereon as to the car company is properly entered; and *held* in this case: the alleged breach of a city ordinance does not appear to have been a proximate cause.

APPEAL by plaintiff from *Clement, J.*, at June Term, 1930, of FORSYTH. Affirmed.

J. M. Wells, Jr., and John C. Wallace for appellant.
Manly, Hendren & Womble for appellees.

ADAMS, J. This action is prosecuted to recover damages for personal injury alleged to have been caused by the negligence of the defendants. When the plaintiff had introduced several witnesses and had closed his evidence, the Southern Public Utilities Company and John Ledford moved for judgment as in case of nonsuit. The motion was allowed and the plaintiff excepted and appealed. As to the defendant Wofford, there was a mistrial and a continuance of the cause pending the appeal of his codefendants.

The evidence is to the effect that on the morning of 2 February, 1927, just before daylight, the plaintiff was at the northeast corner of Twenty-third and Liberty streets in the city of Winston-Salem awaiting the arrival of a street car which was going north on Liberty Street. The defendant Wofford, going in the same direction, was driving an automobile just behind the street car, and as he approached Twenty-third Street he increased his speed and passed the car, which was operated by Ledford as motorman. The plaintiff had left the curb and was walking out to the car track for the purpose of boarding the car, which was moving slowly, when he was struck by the automobile and seriously injured. Wofford admitted that he had passed the street car before it came to Twenty-third Street. There is evidence tending to show that at the time the plaintiff left the sidewalk the street car was going across Twenty-third Street; but the plaintiff said: "I stated in my former examination that at the time the automobile hit me the street car was, in my opinion, ten or twelve feet south of the sidewalk on the south side of Twenty-third Street, and that is what I say now." The width of Twenty-third Street is fifty feet; so, according to the plaintiff's testimony, the street car was at least sixty feet away when the automobile ran against him and threw him on the track. There is no evidence, indeed no contention, that he was struck by the street car.

We find no adequate evidence that between the Utilities Company and the plaintiff there existed at the time of the accident the relation of carrier and passenger. The plaintiff made no signal to the motorman other than "to step off the curb," and there is no proof that the motorman applied brakes in response to the plaintiff's gesture. Neither had the plaintiff placed himself under the company's care or control nor had the company accepted him as a passenger. The law did not impose upon the motorman the duty of protecting the plaintiff from injury resulting from the intervening and insulating negligence of a third party. Under the conditions disclosed upon what principle can the defendant company or its agents be held to the duty of protecting the plaintiff or warning him of the impending danger? None of the cases cited in the appellant's brief, as we understand them, is authority for the imposition of such a duty. We advert, finally, to the alleged breach of the city ordinance only to remark that in no view of the evidence does it appear to have been the proximate cause of the injury. Judgment

Affirmed.

AVERY PRUITT ET AL. v. NEAL WOOD ET AL.

(Filed 3 December, 1930.)

1. **Appeal and Error C c—Where case is not docketed within time prescribed the appeal will be dismissed.**

   Where the parties agree upon an extension of time for service of case on appeal that will not permit the docketing of the appeal in the Supreme Court in time to be heard according to the procedure in such instances, they knowingly put it beyond their power to comply with the mandatory provisions of Rule five of the procedure, and the case will be dismissed in the Supreme Court when these requirements have not been complied with by the appellant.

2. **Appeal and Error C e—Where case is not docketed within time prescribed appellant's procedure is to move for certiorari.**

   Rule five of practice in the Supreme Court fixes the time in which appeals to the Supreme Court shall be docketed, and where the case is not docketed within the time prescribed the appellant, after docketing the record proper, should move for a *certiorari* upon the ground that the case could not be docketed in the time prescribed, but the granting of the writ is within the discretion of the court upon a proper showing and appellant is not entitled thereto as a matter of right.

3. **Appeal and Error D a—Where case is not docketed within time and no certiorari is issued, lower court may adjudge appeal abandoned.**

   Where appellant has failed to docket the record on appeal and no writ of *certiorari* has been allowed in the Supreme Court, the court below may adjudge, upon proper notice, upon proof of such facts, that the appeal has been abandoned.

4. **Appeal and Error C f—Where appeal is not prosecuted according to rules of Court it will be dismissed.**

   The mandatory requirements of the rules regulating appeals to the Supreme Court may not be disregarded or set at naught either by an act of the Legislature, or by order of a Superior Court judge, or by consent of litigants or counsel, the uniform enforcement of the rules being necessary for the courts to properly perform their duties. This matter is fully discussed by STACY, C. J., giving a long line of unbroken decisions, and notice is given that hereafter cases not in conformance with the rules will be dismissed on the authority of this opinion without a discussion of their merits.

APPEAL by plaintiffs from *Harding, J.*, at January Special Term, 1930, of WILKES.

Civil action to restrain defendant from cutting timber, etc.

From a judgment dismissing the action for failure to file bond as required by order of court, the plaintiffs appeal, assigning errors.

J. A. Rousseau and Charles G. Gilreath for plaintiffs.
T. C. Bowie for defendants.

STACY, C. J. From the judgment of dismissal entered at the January Special Term, 1930, Wilkes Superior Court, the plaintiffs gave notice of appeal to the Supreme Court, and were allowed ninety days to make out and serve statement of case on appeal, while the defendants were given sixty days thereafter to prepare and file exceptions or countercase. Upon disagreement, the case was settled by the judge, 16 July, 1930. There was no application for *certiorari* at the Spring Term, 1930, of this Court, the next succeeding term commencing after the rendition of the judgment in the Superior Court, the term to which the appeal should have been brought.

Rule 5 of the Rules of Practice in the Supreme Court (192 N. C., p. 841), provides, among other things, that the transcript of record on appeal from a judgment "rendered before the commencement of a term of this Court" must be brought to such term, the next succeeding term, and docketed here fourteen days before entering upon the call of the district to which the case belongs, with the proviso that appeals in civil cases (but otherwise in criminal cases) from the First, Second, Third and Fourth districts, tried between the first day of January and the first Monday in February, or between the first day of August and the fourth Monday in August, are not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument.

The single modification of this requirement, sanctioned by the decisions is, that where, from lack of sufficient time or other cogent reason, the case is not ready for hearing, it is permissible for the appellant, within the time prescribed, to docket the record proper and move for a *certiorari,* which motion may be allowed by the Court in its discretion, on sufficient showing made, but such writ is not one to which the moving party is entitled as a matter of right. The issuance of a writ of *certiorari,* however, does not change the time already fixed by agreement of the parties, or by order of court, for serving statement of case on appeal, and exceptions or countercase. *Smith v. Smith, ante,* 463.

If the record and transcript are not docketed here at the proper time and no *certiorari* is allowed, the court below, on proof of such facts, may, on proper notice, adjudge that the appeal has been abandoned, and proceed in the cause as if no appeal had been taken. *Dunbar v. Tobacco Growers,* 190 N. C., 608, 130 S. E., 505; *Jordan v. Simmons,* 175 N. C., p. 540, 95 S. E., 919; *Avery v. Pritchard,* 93 N. C., 266.

We have held in a number of cases that the rules of this Court, governing appeals, are mandatory and not directory. *Calvert v. Carstarphen,* 133 N. C., 25, 45 S. E., 353. They may not be disregarded or set at naught (1) by act of the Legislature *(Cooper v. Commissioners,* 184 N. C., 615, 113 S. E., 569), (2) by order of the judge of the Superior Court (*Waller v. Dudley,* 193 N. C., 354, 137 S. E., 149), (3) by consent of litigants or counsel. *S. v. Farmer,* 188 N. C., 243, 124 S. E., 562. The Court has not only found it necessary to adopt them, but equally necessary to enforce them and to enforce them uniformly. *Womble v. Gin Co.,* 194 N. C., 577, 140 S. E., 230. See *Porter v. R. R.,* 106 N. C., 478, 11 S. E., 515, for summary of the decisions.

For the convenience of litigants, counsel and the Court, a fixed schedule is arranged for each term of the Court and a time set apart for the call of the docket from each of the judicial districts of the State. The calls are made in the order in which the districts are numbered. It can readily be seen, therefore, that, unless appeals are ready for argument at the time allotted to the district from which they come, a disarrangement of the calendar necessarily follows, and this often results in delay and not infrequently in serious inconvenience. The work of the Court is constantly increasing, and, if it is to keep up with its docket, which it is earnestly striving to do, an orderly procedure, marked by a due observance of the rules, must be maintained. When litigants resort to the judiciary for the settlement of their disputes, they are invoking a public agency, and they should not forget that rules of procedure are necessary, and must be observed, in order to enable the courts properly to discharge their duties. *Battle v. Mercer,* 188 N. C., 116, 123 S. E., 258. The rules have been revised, annotated and republished in the 192nd Report.

On facts identical in principle with those appearing on the present record, the appeal in the case of *Stone v. Ledbetter,* 191 N. C., 777, 133 S. E., 162, was dismissed *ex mero motu.* The present appeal will be treated in like fashion. The following authorities are also in support of this disposition of the case: *Pentuff v. Park,* 195 N. C., 609, 143 S. E., 139; *S. v. Crowder,* 195 N. C., 335, 142 S. E., 222; *S. v. Surety Co.,* 192 N. C., 52, 133 S. E., 172; *Trust Co. v. Parks,* 191 N. C., 263, 131 S. E., 637; *Finch v. Commissioners,* 190 N. C., 154, 129 S. E., 195; *S. v. Butner,* 185 N. C., 731, 117 S. E., 163; *Rose v. Rocky Mount,* 184 N. C., 609, 113 S. E., 506; *S. v. Johnson,* 183 N. C., 730, 110 S. E., 782; *S. v. Barksdale,* 183 N. C., 785, 111 S. E., 711; *Buggy Co. v. McLamb,* 182 N. C., 762, 108 S. E., 344; *S. v. Satterwhite,* 182 N. C., 892, 109 S. E., 862; *Howard v. Speight,* 180 N. C., 653, 105 S. E., 35; *S. v. Trull,* 169 N. C., 363, 85 S. E., 133.

By requesting and consenting to such a long extension of time for settling case on appeal, the plaintiffs put it out of their power to have the case ready for hearing as required by the rules. This, they did at the peril of losing their right of appeal. *Trust Co. v. Parks, supra.*

We have recently been called upon to consider a number of procedural questions: *Reid v. Reid, ante,* 740 (order vacated because signed by special judge out of county in which cause was pending); *Ellis v. Ellis, ante,* 708 (dismissed for failure to file brief and to send up necessary parts of record proper); *Carter v. Bryant, ante,* 704 (affirmed for failure to serve proper statement of case on appeal); *Rasberry v. Hicks, ante,* 702 (dismissed as moot); *Waters v. Waters, ante,* 667 (dismissed for failure to send up necessary parts of record proper); *Smith v. Smith, ante,* 463 (affirmed for failure to serve statement of case in time); *S. v. Hayeslipps, ante,* 636; *S. v. Massey, ante,* 601; *S. v. Harris, ante,* 377; *S. v. Sharpe, ante,* 377, and *S. v. Bynum, ante,* 376 (all capital cases dismissed for failure to prosecute appeals); *Roberts v. Bus Co.,* 198 N. C., 779 (order striking out statement of case on appeal because not served in time (one day late), affirmed); see, also, *Hardee v. Timberlake,* 159 N. C., 552 (dismissed because case on appeal served two days late); and *Guano Co. v. Hicks,* 120 N. C., 29 (*certiorari* denied because case on appeal served one day late); *Kerr v. Drake,* 182 N. C., 764 (motion to reinstate denied because case on appeal not served in time); *Plott v. Construction Co.,* 198 N. C., 782 (dismissed for failure to send up necessary parts of record proper); *R. R. v. Brunswick County,* 198 N. C., 549 (dismissed because no entry of appeal appeared on record); see, also, *Mfg. Co. v. Simmons,* 97 N. C., 89 (dismissed for failure to note entry of appeal); *Casey v. R. R.,* 198 N. C., 432 (dismissed for failure to reduce evidence to narrative form); *Greene v. Stadiem,* 197 N. C., 472 (dismissed because *coram non judice*); *Schwarberg v. Howard,* 197 N. C., 126 (dismissed for failure to send up necessary parts of record proper); *Cecil v. Lumber Co.,* 197 N. C., 81 (dismissed for failure to group exceptions and assignments of error); see, also, *Rawls v. Lupton,* 193 N. C., 428, and *Byrd v. Sutherland,* 186 N. C., 384, on assignments of error; *S. v. Beasley,* 196 N. C., 797 (dismissed as a nullity); *Johnson v. Mills Co.,* 196 N. C., 93 (dismissed as premature); *Abbitt v. Gregory,* 196 N. C., 9 (dismissed as premature); *Covington v. Hosiery Mills,* 195 N. C., 478 (dismissed for failure to file brief and inattention); *S. v. Taylor,* 194 N. C., 738 (dismissed for failure to prosecute appeal); *S. v. Angel,* 194 N. C., 715 (*certiorari* denied for want of meritorious showing—failure to show probable error—and appeal dismissed for laches); *S. v. Butner,* 185 N. C., 731 (*certiorari* denied for failure to "allege error and assign meritorious grounds for the appeal"); *Womble v. Gin Co.,* 194 N. C., 577 (*alias certiorari* denied for want of meritorious showing); *Bisanar v. Suttlemyre,* 193 N. C., 711 (judgment vacated because signed out of the county and out of the district); *Dunn v. Taylor,* 187 N. C., 385 (order stricken out because signed by judge after leaving bench); *Trust Co. v. Miller,* 191 N. C., 787 (dismissed for failure to file requisite number of transcripts in pauper appeal); *S. v. Farmer,* 188 N. C., 243 (dismissed for failure to bring appeal to next succeeding term of Supreme Court); *Tripp v. Somersett,* 182 N. C., 767 (dismissed for failure to bring appeal to next succeeding term); *Ross v. Robinson,* 185 N. C., 548 (dismissed as frivolous); *Hotel Co. v. Griffin,* 182 N. C., 539 (dismissed as frivolous); *S. v. McDraughon,* 168 N. C., 131 (dismissed for failure to send up indictment, or to supply copy of lost bill); *Cressler v. Asheville,* 138 N. C., 482 (*certiorari* denied and judgment affirmed because stenographer's notes sent up as "case on appeal"); *Sigman v. R. R.,* 135 N. C., 181 (no error found after referring transcript to clerk "to put the record in prescribed shape"); *Burrell v. Hughes,* 120 N. C., 277 (dismissed for failure to bring appeal to next succeeding term, the Court stating in the opinion that "There are *some* matters at least which should be deemed settled, and this is one of them"); *S. v. May,* 118 N. C., 1204 (dismissed because organization of court not shown in transcript); *S. v. Smith,* 152 N. C., 842 (dismissed for failure to aver in affidavit that application to appeal *in forma pauperis* in criminal action "is in good faith"); *Honeycutt v. Watkins,* 151 N. C., 652 (dismissed on ground of defective affidavit to appeal *in forma pauperis* in civil action); *S. v. Keebler,* 145 N. C., 560 (dismissed because defendant had escaped and fled the jurisdiction); *Bowen v. Fox,* 99 N. C., 127 (dismissed for failure to give necessary undertaking on appeal); *S. v. Wagner,* 91 N. C., 521 (dismissed for failure of surety on appeal bond to justify); *S. v. Butts,* 91 N. C., 524 (*certiorari* issued to ascertain whether "court was held by judge authorized to hold it, and at the place and time prescribed by law"); *Burton v. Realty Co.,* 188 N. C., 473 (controversy without action dismissed because no real "question in difference"); *Grandy v. Gulley,* 120 N. C., 176 (controversy without action dismissed for failure to accompany agreed statement of facts with necessary affidavit).

We are minded to say, that hereafter, in disposing of appeals for failure to comply with the rules, the Court shall not feel impelled to state the reasons for its decisions, or to file written opinions in such cases. Hence, when a case is dismissed on authority of *Pruitt v. Wood* (this case), the profession will understand that it is for a failure in some respect to comply with the rules, whether specifically mentioned herein or not, and that the Court cannot pause to discuss the procedural question, but must conserve its time for the consideration of other matters.

Appeal dismissed.

SARAH HURLEY v. J. N. LOVETT.

(Filed 3 December, 1930.)

Libel and Slander D c—Where complaint does not allege that words of defendant imported immorality testimony to this effect is not admissible.

In an action to recover damages for slandering a female when the words sued on are ambiguous, the complaint must allege that the words spoken of and concerning the plaintiff implied immorality in order to admit testimony of witnesses as to their understanding of the intent of the words actually spoken, the wrongful intent being denied both in the answer and in testimony of defendant as a witness.

APPEAL by plaintiff from *Harding, J.*, at January Special Term, 1930, of WILKES. Affirmed.

This is an action to recover damages, both actual and punitive, for slanderous words alleged in the complaint to have been spoken by the defendant of and concerning the plaintiff.

From judgment dismissing the action, at the close of all the evidence, plaintiff appealed to the Supreme Court.

F. J. McDuffie and Trivette & Holshouser for plaintiff.
T. C. Bowie for defendant.

PER CURIAM. The words alleged in the complaint to have been spoken by the defendant of and concerning the plaintiff are slanderous *per se.* However, the words which all the evidence shows were spoken by defendant are not slanderous *per se.* They do not in themselves impute to plaintiff immoral conduct.

Conceding that the words which the evidence shows the defendant did speak of and concerning the plaintiff, are ambiguous and fairly admit of a slanderous interpretation, in the absence of an allegation in the complaint to that effect, there was no error in excluding testimony of witnesses offered by plaintiff as to their understanding of the meaning of the words spoken by the defendant. Defendant in his answer and also as a witness at the trial, denied that he intended to charge or did charge plaintiff with immoral conduct. The evidence as to the circumstances under which the words were spoken, supports the denial of the defendant. The instant case is distinguishable from *Vincent v. Pace,* 178 N. C., 421, 100 S. E., 581, relied on by plaintiff on her appeal to this Court. In that case, it is alleged in the complaint not only that defendant spoke the words set out therein, but also that he intended thereby to charge and did charge plaintiff with a felony, to wit, larceny.

There was no error in the trial of this action. The judgment is

Affirmed.

CLAUDE KEY, BY HIS NEXT FRIEND, D. E. KEY, v. HOME CHAIR COMPANY, INC.

(Filed 10 December, 1930.)

Master and Servant C b—Allegations in this case held insufficient to support action against employer for personal injury.

Allegations of a complaint in a personal injury suit that an employee of defendant was injured while at work putting bottoms in chairs at a low bench with a clamp and screw driver, and that the injuries were caused by the employee's having to stoop over while at work, without allegation of defects in the appliances or proximate cause, are insufficient to state a cause of action, and the action will be dismissed on demurrer *ore tenus* or by the court *ex mero motu.*

APPEAL by plaintiff from *Harding, J.*, at June Term, 1930, of WILKES. Affirmed.

The action was brought by Claude Key, a minor, by his next friend, D. E. Key, to recover damages sustained by Claude Key in the sum of $5,000 alleged to have been suffered by the plaintiff on account of the negligence of the defendant company while the said plaintiff was employed by the defendant company. The case came on to be heard, and after the jury was chosen, and empaneled, and before evidence was introduced, the defendant company, through its counsel, demurred *ore tenus* to the complaint, on the ground that the complaint did not state a cause of action, which motion was sustained by the court, and judgment entered dismissing said action, and taxing the plaintiff with the cost, from which judgment the plaintiff excepted, assigned error and appealed to the Supreme Court.

The material allegations of the complaint are as follows: "That the plaintiff was employed by the defendant company in the fall of 1926, and worked for said company until 30 January, 1929; that when he was employed by the defendant company, he was put on a job of placing bottoms in chairs by means of a hand screw driver, said screws being used to fasten the bottoms in said chairs; that the apparatus on which the chairs were placed, in order to fasten the bottoms to said chairs, was an old time low bench or shelf, and in order to fasten the screws in the bottom of the chairs, this plaintiff was forced to stand in a stooping position, using a hand screw driver with his right hand. That during the year 1928, this plaintiff, on account of standing in the stooping position, which he was required to do to perform his duties, suffered an injury to his right hip and side, the ligaments and nerves being badly strained and injured in said hip, and making it almost impossible for the plaintiff to walk, and from which injuries he has suffered great and excruciating pain in body and in mind, and continues to suffer great pain."

Further allegation was made that Claude Key notified defendant "that he did not have suitable and sufficient tools and appliances with which to do the work on this job, and notwithstanding this notice, the defendant company continued to have him work on said job, until said injuries became so grave and serious that it was necessary for the plaintiff to go to the hospital. . . . That the defendant company was negligent in that, it did not furnish tools and appliances in common use to perform the work which this plaintiff was required to perform, and the said defendant company knew, or should have known, that the tools and appliances furnished to this plaintiff were not such tools and appliances as are in common use, and were not modern nor suitable tools with which to perform the work which he was required to perform."

Claude Key is a minor, 19 years of age.

Trivette & Holshouser and B. T. Henderson for plaintiff.
J. Hubert Whicker for defendant.

PER CURIAM. The defendant demurred ore tenus on the ground that "the complaint does not state facts sufficient to constitute a cause of action. C. S., 511(6). The court below sustained the demurrer and in this we can see no error. There is no allegation in the complaint that the tool used was defective, nor any allegation showing that such defect was known to the defendant or ought to have been known in the exercise of due care, and that such defect was the proximate cause of the injury. On the contrary, what caused the injury is fully set forth, which we do not think is such negligence as gave plaintiff a cause of action against the defendant.

The tool was simple, no defect in it; the place of work was such as required a stooping position, well known to Key, who was 19 years old. Hoeing, picking cotton, planting tobacco and potatoes, cutting wood, sawing logs, shoveling dirt and coal, sweeping and numerous ordinary affairs of life, all require the work to be done by stooping. The allegations that the tools and appliances were not such as in common use and were not modern, on all the facts, do not show negligence. The fact that the old simple method of sweeping required stooping, in the early days a bundle of broom-sage was used and then the manufactured broom with the handle, does not require one to furnish the servant (if the housekeeper does not perform the task) with a vacuum sweeper. In simple ordinary tools and appliances, where there are no defects, known, or in the exercise of due care should have been known, to the employer, and such defects are not the proximate cause of the injury, the application of plaintiff's requirement "such tools and appliances as are in common use and were not modern nor suitable tools," on the facts here, would tend to destroy industry. The risk of employment would be too great to the employer. The very hope of a commonwealth is to encourage work and thrift and create industry, to give employment and by so doing make a happy and contented people. Sickness, ill-health and misfortune are a part of life's burden which humanity must endure with patience. This burden we cannot put on an employer of labor unless negligence is shown. See *Winborne v. Cooperage Co.*, 178 N. C., 88; *Smith v. Ritch*, 196 N. C., 72; *Merritt v. Foundry Co., ante*, 775.

In *Snipes v. Monds,* 190 N. C., at p. 191, it is said: "Even after answering in the trial court, or in this Court, a defendant may demur *ore tenus,* or the Court may raise the question *ex mero motu* that the complaint does not state a cause of action." *Seawell v. Cole,* 194 N. C., at p. 547. The judgment below is

Affirmed.

LOUIS HAAS, TRUSTEE, v. JOHN H. CATHEY, RECEIVER, ET AL.

(Filed 10 December, 1930.)

Receivers I a—After order discharging receiver an independent action for misapplication of funds will not lie unless order is vacated.

After a receiver for a corporation has turned over all the corporation's assets to a trustee in bankruptcy later duly appointed, and has been discharged by the State court that appointed him, the remedy of the trustee in bankruptcy to recover from the receiver for misapplication of funds is by motion in the cause, and an independent action against the receiver, or others receiving benefits, or the surety on the receiver's bond, will not lie unless an order has been made vacating the discharge of the receiver.

APPEAL by plaintiff from *Oglesby, J.*, at October Term, 1930, of BUNCOMBE. Affirmed.

Plaintiff is the trustee in bankruptcy of the Piedmont Electric Company. The defendant, John H. Cathey, was the receiver of said company, appointed by the judge holding the October Term, 1929, of the Superior Court of Buncombe County, in an action instituted therein prior to the adjudication of said Piedmont Electric Company as a bankrupt, entitled, "Knox Porcelain Company *v.* Piedmont Electric Company." The defendant, Maryland Casualty Company, was the surety on the bond filed by the said John H. Cathey as receiver. This action is to recover of the said John H. Cathey, receiver, and the surety on his bond, and of the other defendants the sum of $5,502.36.

It is alleged in the complaint that the defendant, John H. Cathey, while acting as receiver of the Piedmont Electric Company, misapplied certain assets of said company, which came into his hands as receiver, and that his codefendants, other than the Maryland Casualty Company, wrongfully and unlawfully received said assets, or the proceeds of the sale of the same, and wrongfully and unlawfully converted the same to their own use, in fraud of the creditors of the said Piedmont Electric Company.

It appears from Exhibit B, attached to the complaint, and made a part thereof, that after the appointment of plaintiff as trustee in bankruptcy of the Piedmont Electric Company, the defendant, John H. Cathey, receiver of said company, filed his report in the Superior Court of Buncombe County, and turned over and delivered to the plaintiff the assets of said company, then in his hands as receiver. Upon the filing of said report, the said John H. Cathey was discharged as receiver of the Piedmont Electric Company. It is not alleged in the complaint, nor does it appear from exhibits attached thereto, that the order discharging the said receiver has been set aside or vacated. This action was begun after leave had first been obtained from the Superior Court of Buncombe County.

From judgment sustaining demurrers filed by defendants, on the ground that the facts stated in the complaint are not sufficient to constitute a cause of action, and on other grounds, plaintiff appealed to the Supreme Court.

Joseph W. Little and T. W. Lipscombe for plaintiff.

Ford, Coxe & Carter for defendants other than Maryland Casualty Company.

Merrimon, Adams & Adams for defendant, Maryland Casualty Company.

PER CURIAM. There is no error in the judgment sustaining the demurrers filed by the defendants in this action. The order of the Superior Court discharging the defendant, John H. Cathey, as receiver of the Piedmont Electric Company, is conclusive. It is not subject to collateral attack by an independent action. It may be set aside and vacated only for fraud or mistake, by a motion in the cause in which he was appointed and discharged as receiver. *Sarratt v. Gaffney Carpet Mfg. Co.,* 77 S. C., 85, 57 S. E., 616. Until thus set aside and vacated, no action to recover on account of his liability as receiver, can be maintained against him or against the surety on his bond as receiver. The liability of the receiver and of the surety on his bond terminated with his official existence. High on Receivers, sec. 268.

The liability of the defendants other than the defendants, the receiver and the surety on his bond, in the instant case, is predicated on his official liability. It follows that as no cause of action is alleged in the complaint against the receiver, there is no cause of action alleged therein against these defendants.

This action cannot be construed, even under our liberal practice as a motion in the cause, in which the receiver was appointed; it is in fact as well as in form an independent action. It was properly dismissed on the ground that the facts stated in the complaint are not sufficient to constitute a cause of action. We do not discuss the other grounds for demurrer. It is needless to do so, as the judgment dismissing the action must be

Affirmed.

ALEX HARRIS v. BLACK MOUNTAIN RAILWAY COMPANY.

(Filed 10 December, 1930.)

Railroads D b—Mere fact of injury in collison while attempting to cross tracks does not entitle plaintiff to recover.

In an action to recover damages sustained in a collision at a grade crossing, the fact that the plaintiff failed to stop as well as look and listen before attempting to drive his auto-truck across defendant's railroad track does not alone entitle the defendant to a verdict upon the usual issues of negligence, contributory negligence, etc., as other facts and circumstances may be considered and determined by the jury in plaintiff's favor. *Butner v. R. R., ante,* 695, cited as controlling.

APPEAL by defendant from *Harwood, Special Judge,* at March Term, 1930, of YANCEY. No error.

This is an action to recover damages for injuries to the person and to the truck of the plaintiff, caused by the negligence of the defendant, as alleged in the complaint, resulting in a collision, at a public crossing, between defendant's engine and plaintiff's truck.

Issues raised by the pleadings, and involving the actionable negligence of the defendant, the contributory negligence of the plaintiff, as a proximate cause of his injuries and damages resulting from the injuries, were submitted to the jury and answered in accordance with the contentions of the plaintiff.

From judgment that plaintiff recover of the defendant the sum of $6,000, damages for the injuries to his person, and the sum of $400, damages for the injuries to his truck, as assessed by the jury, defendant appealed to the Supreme Court.

Watson & Fouts for plaintiff.

J. W. Pless, J. J. McLaughlin and Chas. Hutchins for defendant.

PER CURIAM. Conceding that under authoritative decisions of this Court, the evidence for the plaintiff, the defendant having offered no evidence, was sufficient to sustain the allegations in the complaint that plaintiff's injuries were caused by the negligence of defendant, on its appeal to this Court, the defendant contends that there was error in the refusal of the trial court to allow its motion for judgment as of nonsuit, at the close of all the evidence, for that all the evidence shows that plaintiff did not stop his truck before driving on the crossing and thus avoid the collision which resulted in his injuries. Defendant contends that such failure was negligence *per se* on the part of the plaintiff, which contributed as a proximate cause to his injuries. This contention cannot be sustained. The principle on which the contention is made is well settled in this State and elsewhere. *Butner v. R. R., ante,* 695; *Harrison v. R. R.,* 194 N. C., 656, 140 S. E., 598; *B. & O. R. R. Co. v. Goodman,* 72 L. Ed., 167. The principle, however, is not applicable in the instant case.

The law in this State does not impose upon the driver of a motor vehicle, on his approach to a public crossing, the duty, under all circumstances, to stop his vehicle before driving on the crossing. Whether under all the circumstances, as the evidence tends to show, and as the jury may find from the evidence, the failure of the driver to stop, as well as to look and listen for an approaching train at a railroad crossing, was negligence on his part, is ordinarily a question involving matters of fact as well as of law, and must be determined by the jury under proper instructions from the court. This principle has statutory recognition in this State, and was properly applied in the instant case. The judgment is affirmed on the authority of *Butner v. R. R., supra.*

No error.

ATLAS SUPPLY COMPANY, INC., v. F. L. MCCURRY, EMMA J. MCCURRY, S. G. BERNARD, TRUSTEE FOR PROVIDENT MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, AND G. D. CARTER, TRUSTEE OF THE BANK OF WEST ASHEVILLE.

(Filed 10 December, 1930.)

1. **Laborers' and Materialmen's Liens B a—Whether notice of claim of lien was filed within time held for jury upon conflicting evidence.**

Where the material furnisher for a building files his notice of claim, C. S., 2470, the lien against the building of the owner relates back to the time the delivery was completed, and action must be commenced within six months after the filing of the above notice (C. S., 2444, not applying), and in that event the lien is preserved from the furnishing of the material and is superior to a deed of trust registered since that time, and where the evidence is conflicting the question is for the jury under proper instructions from the court.

2. **Evidence I b—Bill of lading produced by railroad clerk in charge of records held competent on question as to when goods were delivered.**

Where the question is for the jury as to the time a material furnisher in his action to enforce his lien has finally completed the delivery of the material to the building of the owner under construction and against which the lien has been filed, C. S., 2470, 2474, a clerk of a railroad company that had transported and delivered it at its destination and who had charge and control of the carrier's records relating to it, is competent on the trial to produce the bill of lading showing the time of its shipment, of the time of delivery at destination to a drayman for local delivery to the owner's premises, the probative force being for the jury to determine.

APPEAL by plaintiff from *MacRae, Special Judge,* and a jury, at June Term, 1930, of BUNCOMBE. No error.

This is a civil action brought by the plaintiff to enforce a lien against the lands of the defendants, F. L. McCurry and wife, Emma J. McCurry, in which the plaintiff seeks to recover the sum of $815.00 for goods sold and delivered, consisting of plumbing material furnished by the plaintiff to the defendants McCurry for a house which was built by them on a vacant lot in the city of Asheville, N. C.

The plaintiff filed a lien for material furnished, in the Superior Court of Buncombe County on 31 July, 1929, and commenced its action to enforce said lien on 7 November, 1929.

The issue and verdict were as follows: "Did the plaintiff file notice of lien upon the property of the defendants, F. L. McCurry and wife, within the time required by law? Answer: No."

The plaintiff assigned numerous errors and appealed to the Supreme Court.

Joseph W. Little for plaintiff.
Bernard, Williams & Wright for defendant insurance company.

PER CURIAM. The question involved: Did the plaintiff file notice of lien upon the property of the defendants, F. L. McCurry and wife, within the time required by law? We think not from the jury's finding.

C. S., 2433: "Every building built, rebuilt, repaired or improved, together with the necessary lots on which such building is situated, and every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or material furnished."

C. S., 2470: "Notice of lien shall be filed as hereinbefore provided, except in those cases where a shorter time is prescribed, at any time within six months after the completion of the labor or the final furnishing of the materials, or the gathering of the crops."

The shorter time referred to is that set out in C. S., 2444, but does not affect this controversy.

C. S., 2474: "Action to enforce the lien created must be commenced in the court of a justice of the peace, and in the Superior Court, according to the jurisdiction thereof, within six months from the date of filing the notice of the lien. But if the debt is not due within six months, but becomes due within twelve months, suit may be brought or other proceedings instituted to enforce the lien in thirty days after it is due."

The matter has been recently fully discussed in *King v. Elliott,* 197 N. C., 93.

The only question in this controversy was to whether plaintiff had filed its lien against the property of F. L. McCurry and wife, Emma McCurry, within six months from the final furnishing of the material. Plaintiff contended that it had "filed a lien in the Superior Court of Buncombe County, recorded in Lien Book 9, page 65, on 31 July, 1929. The deed of trust to S. G. Bernard, trustee, was made on 27 March, 1929, and recorded 9 April, 1929. The deed of trust to G. D. Carter, trustee, was made and recorded after the Bernard deed of trust. In filing its lien, the plaintiff showed that the goods were furnished between the dates 18 January, 1929, and 31 January, 1929, so that its lien related back to the time the materials were furnished. And the lien, therefore, if valid, was superior to the liens created by the deeds of trust. The plaintiff instituted this action on 7 November, 1929, to enforce its lien."

The defendant contended: "Said materials were shipped by plaintiff to Sanitary Plumbing and Heating Company from Winston-Salem, N. C., 18 January, 1929, were unloaded at Asheville 21 January, 1929, delivered to Folson Transfer Company 23 January, 1929, and hauled and delivered upon the premises of McCurry and wife by said Folson Transfer Company 23 January and 24 January, 1929."

If the materials were furnished according to plaintiff's contention, between 18 January, 1929, and "final furnishing of the materials" on 31 January, 1929, it being a single order, as appears by the record, and the lien was filed on 31 July, 1929, then the lien was filed within the statutory period of six months, and related back and was prior to defendants' lien. *King v. Elliott, supra.* On the other hand, if the defendants' contention is correct that the material was unloaded at Asheville on 21 January, and delivered on the premises of McCurry and wife, 23 and 24 January, 1929, then plaintiff had no lien under the statute. See *Gravel Co. v. Casualty Co.,* 191 N. C., 313.

The question as to the "final furnishing of the materials" to McCurry and wife was one of fact, which has been found against plaintiff. We have read the charge of the court below carefully and see no error in it. It was a simple case and the court fully complied with C. S., 564. *Davis v. Long,* 189 N. C., 129.

The clerk of the Southern Railway Company, who had charge and control of its records as to matters of this kind, produced the bill of lading showing when the material was shipped from Winston-Salem to Asheville, on 18 January, 1929, and the record of unloading in Asheville 21 January, 1929, and delivery to drayman 23 January, 1929. This evidence is competent, the probative force is for the jury. *R. R. v. Hegwood,* 198 N. C., 309.

In the judgment of the court below there is
No error.

J. G. McCUE v. THE TIMES-NEWS COMPANY, INC.

(Filed 10 December, 1930.)

Venue B a—Venue of action for libel by nonresident against newspaper is in county where paper's principal office is situate.

The proper venue of an action by a nonresident plaintiff against a newspaper corporation with its principal office or place of business in this State is in that county, and an action brought in a different county in this State is removable thereto on defendant's motion duly made, and the facts so found by the lower court are not reviewable on appeal.

APPEAL by plaintiff from *Sink, Special Judge,* at July Term, 1930, of BUNCOMBE.

Joseph W. Little and Wm. F. Toms for plaintiff.
Thomas H. Franks and Shipman & Arledge for defendant.

PER CURIAM. The plaintiff brought suit in Buncombe County to recover damages for alleged libel. The defendant is a domestic corporation having its principal office and place of business in Hendersonville, Henderson County, and in apt time made a motion to remove the cause to the county of Henderson. The motion was granted; the plaintiff excepted and appealed.

For the purpose of suing and being sued the principal place of business of a domestic corporation is its residence. C. S., 466. If the plaintiff is a nonresident of the State, the residence of the defendant is the proper venue in actions of this kind. C. S., 469; *Southern Cotton Oil Company v. Grimes,* 183 N. C., 97.

The trial court found as a fact from the evidence that the plaintiff is not a resident of Buncombe County and is a nonresident of the State. The appellate court is bound by this finding. Judgment

Affirmed.

NAOMI ELMORE v. DUDLEY SHOALS COTTON MILLS COMPANY.

(Filed 2 July, 1930.)

APPEAL by defendant from *Shaw, J.,* at November Term, 1929, of MECKLENBURG.

Civil action to recover damages for an alleged negligent injury occasioned by a revolving shaft, located in the basement of defendant's mill, catching plaintiff's clothing and injuring her severely.

It is admitted that on or about 1 October, 1915, the plaintiff, at that time a little girl about ten years of age, was injured in defendant's mill, but it is denied that she was in the employ of the defendant, or was permitted to work in the defendant's mill in violation of the State child labor law. Largely upon this question, with evidence *pro* and *con,* the case was made to turn in the court below.

The jury returned the following verdict:

"1. Was the plaintiff employed or permitted to work in defendant's mill, while under 12 years of age, as alleged in the complaint? Answer: Yes.

"2. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"3. What damages, if any, is plaintiff entitled to recover? Answer: $8,000."

From a judgment on the verdict, the defendant appeals, assigning errors.

Carswell & Ervin and John M. Robinson for plaintiff.
J. F. Newell and J. H. McLain for defendant.

PER CURIAM. On controverted issues of fact, the jury has found in favor of the plaintiff. The case was tried in substantial conformity to the principles of law applicable and the authoritative decisions on the subject. We have found no ruling or action on the part of the learned trial judge which we apprehend should be held for reversible error. Hence, the verdict and judgment will be upheld.

The motion for a new trial on the ground of newly discovered evidence is without controlling merit, and must be overruled as not meeting the requirements laid down for such motions in *Johnson v. R. R.*, 163 N. C., 431, 79 S. E., 690.

No error.

JOHN KEAIS HOYT, ADMINISTRATOR, v. A. S. COPELAND ET AL.

(Filed 2 July, 1930.)

APPEAL by defendants from *Small, J.*, at April Term, 1930, of BEAUFORT.

Civil action for the construction of a will as it relates to a share of testator's personal property, and for direction as to the distribution of said share.

From the decree entered conformably to the prayer of the petition the defendants appeal, assigning error.

McLean & Rodman for plaintiff.
Dawson & Jones for defendants.

PER CURIAM. No error is apparent on the record, and, as the case involves no new question of law, it seems of little avail to set out the will or the facts inducing its interpretation. That the decision is authorized, would seem to be supported by what was said in *Trust Co. v. Lentz,* 196 N. C., 398, 145 S. E., 776.

Affirmed.

MRS. ACREE FLYTHE v. W. J. LASSITER.

(Filed 2 July, 1930.)

APPEAL by defendant from *Small, J.*, and a jury, at October Term, 1929, of NORTHAMPTON. No error.

The plaintiff and defendant are sister and brother. A. Lassiter was the father of the plaintiff and defendant. On 29 May, 1923, A. Lassiter owned a certain tract of land and made a will. The fifth item is as follows: "I give and bequeath to my daughter, Mrs. Acree Flythe, the tract of land lying on the east side of the railroad running down the Murfreesboro road to a new ditch, thence north said ditch to the end of the new ditch, thence east to a branch, thence the old line back to the railroad lot." A. Lassiter died on 9 February, 1928, aged 87 years. His will was duly probated and recorded in Will Book 9, page 519, Northampton County, N. C. Before A. Lassiter died, on 28 March, 1927, he made, executed and delivered a deed to a part of the land that he had willed to the plaintiff to the defendant. Deed recorded in Book 220, p. 485, registry of said county. The plaintiff instituted this action to set the deed aside on the ground that it was executed by fraud and undue influence on the part of defendant.

The issue submitted to the jury and their answer thereto were as follows: "Did the defendant obtain the deed described in section 2 of the complaint from his father, A. Lassiter, by fraud or undue influence, as alleged in the complaint? Answer: Yes."

Judgment was duly rendered by the court below on the verdict. Defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

Gay & Midyette and Geo. C. Green for plaintiff.

Burgwyn & Norfleet, Travis & Travis and R. Jennings White for defendant.

PER CURIAM. The defendant, at the close of plaintiff's evidence and at the close of all the evidence, moved for judgment as in case of nonsuit. C. S., 567. The motions were overruled by the court below and in this we can see no error.

We have read the record and the able briefs of the litigants with care, and we can see no new or novel proposition of law involved in the controversy. It was mainly a question of fact for the jury's determination, and they have decided for the plaintiff. We see no prejudicial or reversible error in law on the record. A repetition of the facts from the record and the law bearing on defendant's assignment of errors we think unnecessary to set forth.

The litigation was between sister and brother; the jury decided the issue in favor of the sister. We are bound by the findings.

In the judgment we find

No error.

WILLIAM R. GIBBS, TRADING AND DOING BUSINESS AS GREENSBORO CUT STONE WORKS, v. HIGH POINT, THOMASVILLE AND DENTON RAILROAD COMPANY.

(Filed 20 August, 1930.)

CIVIL ACTION, before *Lyon, Emergency Judge*, at November Term, 1929, of GUILFORD.

The plaintiff instituted action against the defendant as delivering carrier for damage to a certain shipment of stone. The stone was shipped from Colitic, Indiana, on or about 23 February, 1927, on a through bill of lading. There was a verdict for the plaintiff and the defendant appealed.

Kenneth M. Brim for plaintiff.
James B. Lovelace for defendant.

PER CURIAM. The judgment is affirmed upon the authority of *Brown v. Express Co.,* 192 N. C., 25, 133 S. E., 414, and *Sumrell v. R. R.,* 152 N. C., 269, 67 S. E., 585.

No error.

C. A. ISENHOUR, ADMINISTRATOR OF KENNETH E. MICHAEL, v. FRANK EFIRD.

(Filed 20 August, 1930.)

CIVIL ACTION for wrongful death, before *Stack, J.,* at October Term, 1929, of CABARRUS.

The plaintiff instituted an action against the defendant for wrongful death resulting from an automobile collision upon a public highway. Judgment was duly rendered upon the verdict in favor of the plaintiff and the defendant appealed.

Hartsell & Hartsell for plaintiff.
John M. Robinson and Hunter M. Jones for defendant.

PER CURIAM. There was sufficient evidence of negligence to be submitted to the jury.

The evidence as to the earnings of deceased while law librarian at the University of West Virginia was weak and uncertain, but it cannot be said as a matter of law, that the testimony objected to constituted no evidence at all. *Smith v. Coach Line,* 191 N. C., 589, 132 S. E.,

567. Certain excerpts are selected from the charge of the trial judge which discloses that the words "proximate cause" do not appear, but in the outset the trial judge instructed the jury: "But negligence alone is not sufficient to entitle one to recover. One who claims damages on account of negligence of another must show two propositions by the greater weight of the evidence. . . . First, that the injury or death was caused by the negligence of defendant; secondly, that the particular negligence alleged was the proximate cause of the death and injury; and proximate cause is the real efficient cause without which the injury or death would not have occurred."

Exceptions were also taken to the instruction of the trial judge to the jury relative to the issue of damages. However, we do not think that such exceptions are of sufficient weight to overthrow the judgment.

No error.

MRS. BERTIE STUBBS, ADMINISTRATRIX OF THE ESTATE OF ROBERT W. STUBBS, DECEASED, v. CHICAGO MILL AND LUMBER CORPORATION, WILTS NATIONAL VENEER CORPORATION, W. EBNER, AND D. C. BOYD.

(Filed 17 September, 1930.)

APPEAL by plaintiff from *Nunn, J.*, at New Bern, North Carolina, 29 July, 1930. From WASHINGTON. Affirmed.

W. L. Whitley for plaintiff.
Zeb Vance Norman and MacLean & Rodman for defendants.

PER CURIAM. The judgment of the court below is affirmed on the authority of *Wright v. Utility Co.*, 198 N. C., 204.

Affirmed.

FARMERS BANK AND TRUST COMPANY v. TURNER VINSON AND WIFE, ELIZABETH VINSON.

(Filed 17 September, 1930.)

APPEAL by plaintiff from *Small, J.*, at July Special Term, 1930, of JOHNSTON. Affirmed.

Jno. A. Narron and Leon G. Stevens for appellant.
Wellons & Wellons and Pou & Pou for defendants.

PER CURIAM. Upon a petition duly filed by the defendants Judge Small made an order on 22 July, 1930, directing certain officers of the plaintiff corporation to appear before the clerk of the Superior Court of Johnston County at a designated time to be examined by the defendants, who desired information upon which to file their answer. Thereafter the plaintiff made a motion to vacate this order. The motion was denied. The judgment is affirmed upon authority of *Buchholz v. Ferguson,* 198 N. C., 699, and cases therein cited.

Affirmed.

STATE v. ELDRIDGE BENTHAL AND GILBERT BRETT.

(Filed 24 September, 1930.)

APPEAL by defendants from *Cranmer, J.,* at July Term, 1930, of HERTFORD. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

E. R. Tyler and D. C. Barnes for defendants.

PER CURIAM. The defendants were convicted upon an indictment charging them with the larceny of peanuts. From the sentence pronounced they appealed upon several assignments of error. We have considered each of the exceptions and find no sufficient cause for granting a new trial.

No error.

W. J. EDWARDS AND A. P. HARPER, TRADING AS HARPER MOTOR COMPANY, v. J. R. MORRIS.

(Filed 24 September, 1930.)

APPEAL by defendant from *Nunn, J.,* at February Term, 1930, of PITT.

Civil action to recover on a note given in settlement of an exchange of automobiles, with ancillary proceeding of claim and delivery.

From a verdict and judgment in favor of plaintiff, the defendant appeals, assigning errors.

Arthur B. Corey for plaintiff.
Julius Brown and A. R. Dunning for defendant.

PER CURIAM. We have discovered no reversible error on the record, and, as the case involves no new question of law, the verdict and judgment will be upheld, without an elaboration of the exceptions.

No error.

W. H. LILLY ET UX. v. CAMPBELL E. SMITH ET UX.

(Filed 1 October, 1930.)

Appeal and Error J e—Where alleged error would not change result of trial the cause will not be remanded.

Where issues submitted to the jury are not in accordance with the theory upon which the case was tried, but the result of the trial agrees with the theory and involves only a question of fact, the case will not be remanded for another hearing.

APPEAL by defendants from *Nunn, J.*, at March Term, 1930, of PITT.

Civil action to recover $900.00, alleged overpayment in the purchase of a lot of land.

The case revolves around an owelty charge against said lot, existing in favor of Mrs. Sadie Lilly, which plaintiffs allege was to be considered as a part of the purchase price and adjusted accordingly. This was denied by the defendants.

From a verdict and judgment for plaintiffs, the defendants appeal, assigning errors.

Albion Dunn for plaintiffs.
Louis W. Gaylord for defendants.

PER CURIAM. The issues submitted are not accordant with the theory upon which the case was tried, but as the result agrees with the theory of the trial and involves only a question of fact, it would apparently serve no useful purpose to remand the cause for another hearing. *Pate v. Gaitley,* 183 N. C., 262, 111 S. E., 339.

No error.

J. W. HUGHES ET AL. v. GEORGE T. HEWLETT ET UX.

(Filed 15 October, 1930.)

APPEAL by plaintiffs from *Nunn, J.*, at April Term, 1930, of NEW HANOVER.

Civil action to recover damages for an alleged breach of covenant of seizin, tried upon the following issue:

"Did the defendants breach the covenant of seizin contained in the deed executed by them to plaintiffs, as alleged in the complaint? Answer: No." (The issue of damages was not answered.)

Judgment on the verdict for defendants, from which the plaintiffs appeal, assigning errors.

Carr, Poisson & James for plaintiffs.
Herbert McClammy for defendants.

PER CURIAM. The case resolved itself into a contest over disputed facts. The verdict speaks for itself. We have discovered no ruling or action on the part of the trial court which we apprehend erroneously influenced the result.

In the absence of demonstrated error, the verdict and judgment will be upheld.

No error.

E. F. YOUNG, RECEIVER OF BANK OF COATS, v. A. A. McDONALD, CHICKAMAUGA TRUST COMPANY, TRUSTEE, AND PRUDENTIAL INSURANCE COMPANY OF AMERICA.

(Filed 15 October, 1930.)

APPEAL by plaintiff from *Lyon, Emergency Judge,* at April Term, 1930, of HARNETT. Affirmed.

E. F. Young for plaintiff.
John N. Duncan for defendant, Chickamauga Trust Company, Trustee, and Prudential Insurance Company.

PER CURIAM. This is an action brought by E. F. Young, receiver of Bank of Coats, who held a second lien on the land in controversy, to restrain the defendants, Chickamauga Trust Company, trustee, and Prudential Insurance Company, of America, from selling under its first lien. The answer of said defendants, Chickamauga Trust Company, trustee, and Prudential Insurance Company of America, set up the plea of *res judicata* that defendant, A. A. McDonald and wife, Mary Reade McDonald, the makers of both liens, had theretofore brought an action to restrain defendant, Chickamauga Trust Company, trustee, from selling, "alleging as a basis of said action that there was no delinquent installments of principal and interest due on said note and upon the pleadings and affidavits in said action, Judge N. A. Sinclair found as a fact that the said installments were delinquent and ordered the restraining order issued in that action dissolved. The said A. A. McDonald appealed to the Supreme Court from said judgment, but never perfected said appeal, and it was dismissed under Supreme Court Rule 10, and judgment certified down to the clerk of the Superior Court of Harnett County. These defendants say that the allegations contained in paragraph 9 of the complaint in this action involve a question which is *res judicata* and ask that the pleadings, affidavits and judgments rendered in the action brought by A. A. McDonald and wife, Mary Reade McDonald, against these defendants be considered a part of this answer by reference thereto as fully as if set out herein."

The above matter of *res judicata*, the affidavit of defendant, A. A. McDonald, and the affidavit of M. M. Elliott, president of the defendant, Chickamauga Trust Company, trustee, were all in evidence in the court below.

The court below rendered the following judgment: "This cause coming on to be heard before the undersigned judge of the Superior Court, and being heard upon the pleadings and affidavits of plaintiffs and defendants: It is hereupon ordered and adjudged that the restraining order heretofore issued in this case be, and the same is hereby dissolved, the court having found as a fact that the deed of trust from A. A. McDonald and wife to the Chickamauga Trust Company, trustee, is a prior lien to that of the Bank of Coats, and the said defendants are hereby permitted to proceed to foreclose their deed of trust."

The judgment of the court below is affirmed on authority of *Roebuck v. Carson,* 197 N. C., 492.

Affirmed.

EMMA RATCLIFF v. W. H. DUNCAN.

(Filed 22 October, 1930.)

APPEAL by defendant from *Schenck, J.,* at October Term, 1929, of SWAIN.

Civil action in ejectment or to recover possession of a tract of land.

From a directed verdict in favor of plaintiff, and judgment thereon, the defendant appeals, assigning errors.

Moody & Hall for plaintiff.
Edwards & Leatherwood and Alley & Alley for defendant.

PER CURIAM. No error having been made to appear, the verdict and judgment will be upheld.

No error.

E. A. HELSABECK v. H. F. VASS ET AL.

(Filed 22 October, 1930.)

APPEAL by defendant, H. F. Vass, from *Johnson, Special Judge,* at March Term, 1930, of FORSYTH.

Civil action to restrain sale of property under execution.

From a verdict and judgment in favor of plaintiff, the defendant, H. F. Vass, appeals, assigning errors.

W. T. Wilson and Chas. R. Helsabeck for plaintiff.
J. E. Alexander and Lacy M. Butler for defendant, appellant.

PER CURIAM. The trial of the case accords substantially with the opinion rendered on the first appeal, 196 N. C., 603, 146 S. E., 576, and it would serve no useful purpose to reiterate the facts or to restate the contentions of the parties. The record is apparently free from reversible error. The verdict and judgment will be upheld.

No error.

CAMEL CITY LUMBER COMPANY v. C. C. INGRAM ET AL.

(Filed 5 November, 1930.)

APPEAL by defendants from *Clement, J.,* at April Term, 1930, of FORSYTH.

Civil action to recover for materials furnished by plaintiff and used by H. L. Steelman, contractor, in the construction of an apartment house for C. C. Ingram, owner.

From the judgment entered on facts agreed, found or not disputed, the defendants appeal, assigning error.

A. B. Cummings for plaintiff.

Nat S. Crews, Fred S. Hutchins, Polikoff & Kirven, W. H. Boyer, C. F. Burns, R. M. Weaver and L. V. Scott for defendants.

PER CURIAM. The record discloses no exceptive assignment of error of sufficient merit to warrant a reversal of the judgment. Hence, it will not be disturbed.

No error.

W. REUBEN RUDD v. R. L. HOLMES.

(Filed 12 November, 1930.)

APPEAL by defendant from *Schenck, J.,* at August Term, 1930, of GUILFORD. No error. See 196 N. C., 640.

H. R. Stanley for plaintiff.

John W. Hester and T. Glenn Henderson for defendant.

PER CURIAM. We have examined the exceptions of the appellant and have discovered no error which entitles him to a new trial.

No error.

YELLOW CAB COMPANY v. J. V. KAMOS.

(Filed 19 November, 1930.)

APPEAL by plaintiff from *Moore, J.,* at March Term, 1930, of RICHMOND.

Civil action and cross-action for damages arising out of a collision between plaintiff's Chrysler sedan and defendant's Buick automobile, which occurred on Highway No. 20 near the town of Rockingham, N. C., with the owner of each car alleging negligence on the part of the driver of the other.

The jury awarded the defendant $25 on his counterclaim, after finding that the collision was due to the negligence of plaintiff's driver. Plaintiff appeals, assigning errors.

F. Donald Phillips for plaintiff.
Fred W. Bynum for defendant.

PER CURIAM. No substantial error appears on the record, hence the verdict and judgment will be upheld.

No error.

THE PILOT COMPANY v. CHESTER MOTSINGER.

(Filed 26 November, 1930.)

APPEAL by plaintiff from judgment of *Stack, J.*, at September Term, 1930, of FORSYTH. Affirmed.

This action to recover of defendant the sum of $850, the amount of a note executed by him, dated 15 November, 1922, and due one year after date, was begun in the Forsyth County Court, on 19 February, 1930. At the trial in said court the issue submitted to the jury, to wit, "What amount, if any, is the defendant indebted to the plaintiffs?" was answered, "Nothing."

From judgment that plaintiff recover nothing of the defendant in this action, plaintiff appealed to the Superior Court of Forsyth County, assigning errors based on exceptions to the admission of evidence, and to instructions to the jury in the charge of the court to the jury.

From the judgment of the Superior Court, overruling its assignments of error, and affirming the judgment of the Forsyth County Court, plaintiff appealed to the Supreme Court.

Ratcliffe, Hudson & Ferrell for plaintiff.
Archie Elledge for defendant.

PER CURIAM. We find no error in the judgment of the Superior Court, overruling plaintiff's assignments of error on its appeal to that court, and affirming the judgment of the Forsyth County Court. The judgment is, therefore,

Affirmed.

C. A. PORTER v. JACKSON GOLD MINING COMPANY AND L. BARNETTE NEWBY.

(Filed 26 November, 1930.)

APPEAL by plaintiff from *Moore, J.*, at March Term, 1930, of UNION.

Admissions in answer sufficient to overcome defendant's motion of nonsuit in this case.

Vann & Milliken for plaintiff.
H. B. Adams for defendants.

PER CURIAM. The plaintiff brought suit against the defendants for the sum of $3,900 for services alleged to have been performed under a contract made in the month of October, 1927. The defendants denied liability, Newby alleging that he had paid the plaintiff the entire amount he had agreed to pay and set up a counterclaim against the plaintiff for $640.87. When the plaintiff had introduced his evidence and rested the defendants moved for judgment of nonsuit and the motion was allowed. The plaintiff excepted and appealed.

We affirm the judgment of nonsuit as to the Jackson Gold Mining Company, but in view of the admission in Newby's answer in reference to his agreement with the plaintiff and the plaintiff's testimony in respect to it we are of opinion that as to Newby the judgment of nonsuit should be set aside.

Judgment affirmed as to Jackson Gold Mining Company and reversed as to Newby.

STATE v. BAXTER FLETCHER.

(Filed 3 December, 1930.)

APPEAL by defendant from *Stack, J.*, at August Term, 1930, of WILKES.

Criminal prosecution tried upon an indictment charging the defendant, in four separate counts, with prostitution and assignation and with aiding and abetting prostitution and assignation, contrary to C. S., 4357, and 4358.

From an adverse verdict and judgment entered thereon, the defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Trivette & Holshouser and F. J. McDuffie for defendant.

PER CURIAM. It is conceded by the Attorney-General that the State's evidence fails to make out any one of the offenses charged. No useful purpose would be accomplished by setting out the evidence. The motion to nonsuit will be allowed under C. S., 4643.

Reversed.

CALVIN GARLAND v. J. WALTER WRIGHT.

(Filed 3 December, 1930.)

APPEAL by defendant from *Harding, J.,* at April Term, 1930, of MITCHELL.

Civil action for specific performance of a written contract to convey a certain tract of land in consideration of a right of way over other lands, and to recover damages for trespass.

From a judgment in favor of plaintiff, with damages assessed at $90, the defendant appeals, assigning errors.

Walter C. Berry and J. W. Pless for plaintiff.

McBee & McBee and T. C. Bowie for defendant.

PER CURIAM. The appellant has failed to show that reversible error was committed on the trial. Hence, the verdict and judgment will be upheld.

No error.

J. FRANCIS TRON, JR., ADMINISTRATOR, v. SINCLAIR REFINING COMPANY ET AL.

(Filed 3 December, 1930.)

APPEAL by defendant, Sinclair Refining Company, from *Shaw, J.,* at August Term, 1930, of BURKE.

Civil action for wrongful death brought against Sinclair Refining Company, a corporation chartered under the laws of the State of Maine, and B. D. Williams and R. A. Self, citizens and residents of Catawba County, N. C.

Motion by nonresident, corporate defendant, to remove cause to the District Court of the United States for the Western District of North Carolina for trial. Motion denied, and movant appeals.

J. Francis Tron, Jr., S. J. Ervin and S. J. Ervin, Jr., for plaintiff.
C. H. Gover for defendant, Sinclair Refining Company.

Per Curiam. The petition for removal, besides showing the presence of the requisite jurisdictional amount, asserts a right of removal on the ground of diverse citizenship, and alleges that the resident defendants have been fraudulently joined to prevent such removal.

No new question of law is presented by the appeal. The trial court held that the case was controlled by the line of decisions of which *Givens v. Mfg. Co.,* 196 N. C., 377, 145 S. E., 681, and *Crisp v. Fibre Co.,* 193 N. C., 77, 136 S. E., 238, may be cited as fairly illustrative, while the appellant contends that the principles announced in *Cox v. Lumber Co.,* 193 N. C., 28, 136 S. E., 254; *Johnson v. Lumber Co.,* 189 N. C., 81, 126 S. E., 165, and *Rea v. Mirror Co.,* 158 N. C., 24, 73 S. E., 116, are more nearly applicable. No error in the ruling of the trial court has been shown.

Affirmed.

JAMES MacRAE v. THE WILLIAM BURNS INTERNATIONAL DETECTIVE AGENCY, Inc.

(Filed 10 December, 1930.)

Appeal by defendant from *Oglesby, J.,* at October Term, 1930, of Buncombe. No error.

Martin & Martin for appellant.
J. C. Cheesborough and W. A. Sullivan for appellee.

Per Curiam. The plaintiff brought suit to recover an amount alleged to be due him by the defendant for services rendered in the capacity of an attorney. The issue was answered against the defendant and the plaintiff was given a judgment. We have examined the appellant's exceptions and find

No error.

NORMAN E. BYRUM v. A. B. HOUTZ AND RICHARD McNEAL.

(Filed 10 December, 1930.)

APPEAL by plaintiff from *Nunn, J.*, at January Term, 1930, of PASQUOTANK. Affirmed.

This was an action for actionable negligence brought by plaintiff against defendants. The plaintiff alleged: "(1) That the defendant, A. B. Houtz, is now, and was at the times hereinafter set forth, the owner and in possession of a sawmill situate in the county of Perquimans, in said State, and at the time of the injuries hereinafter complained of, was engaged in operating said mill for the manufacture of lumber and staves."

The defendants' answer to the complaint says: "Section 1 of the complaint is denied."

The issues submitted to the jury were as follows:

"1. Was the plaintiff injured by the negligence of the defendant, Richard McNeal, as alleged in the complaint?

2. Was the plaintiff injured by the negligence of the defendant, A. B. Houtz, as alleged in the complaint?

3. Did the plaintiff assume the risk of his injury as alleged in the answer?

4. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer?

5. What damages, if any, is the plaintiff entitled to recover?"

The court below rendered the following judgment: "This cause coming on now to be heard and being heard, and issues having been submitted to the jury as appears of record; and the court having announced, at the conclusion of the testimony, that he would charge the jury upon the second issue as follows, to wit: If you believe the evidence, and find the facts to be as all the evidence tends to show, then it would be your duty to answer the second issue No; and the plaintiff, through his counsel, having thereupon stated, in open court, that he elected to take voluntarily, a judgment as of nonsuit as to the defendant, Richard McNeal, and that, in deference to the court's announced views and ruling upon the second issue, he further elected to submit involuntarily to a judgment as of nonsuit as to the defendant, A. B. Houtz. Now, therefore, it is ordered, decreed and adjudged that judgment as of nonsuit be, and same is hereby entered, and that the defendants go without day."

W. S. Privott, H. R. Leary, Ehringhaus & Hall for plaintiff.
McMullan & LeRoy for defendants.

PER CURIAM. Plaintiff contends that "The sole question presented on this record is whether plaintiff offered and was permitted to introduce sufficient evidence to make out a prima facie case of liability against defendant, A. B. Houtz, or whether the judge was justified in intimating an opinion adverse to plaintiff's right to recover as against said defendant."

We do not think there was any error in the rulings of the court below or the judgment signed. We see no merit in plaintiff's assignments of error. We do not think the evidence sufficient to be submitted to the jury. *Denny v. Snow, ante,* 773. The judgment of the court below is

Affirmed.

WILLIAM A. SULLIVAN v. J. E. SWAIN ET AL.

(Filed 10 December, 1930.)

APPEAL by plaintiff from *Webb, J.,* at May Term, 1930, of BUNCOMBE.

Application for writ of mandamus to require the defendant, board of elections of Buncombe County, to place the plaintiff's name on a ballot to be used in the Democratic primary, 7 June, 1930, for nomination as candidate for office of judge of the General County Court of Buncombe County in the general election to be held 4 November, 1930, denied because, under the law, it was not clear that the defendant, board of elections, had ruled erroneously in declaring that no election was to be held for said office in 1930, for that the term of the present encumbent did not expire until 31 December, 1931. No primary election was held in June, 1930, for said nomination; and no election was held in November, 1930, for said office.

Plaintiff appeals, assigning error.

A. Hall Johnston, J. M. Horner, Jr., and William A. Sullivan in propria persona for plaintiff.

No counsel for defendants.

PER CURIAM. Dismissed as moot on authority of *Pruitt v. Wood, ante,* 788, and *Rasberry v. Hicks, ante,* 702.

Appeal dismissed.

W. W. GUY v. C. A. GOULD ET AL.

(Filed 10 December, 1930.)

APPEAL by defendants from *Harding, J.*, at July Term, 1930, of MCDOWELL.

Civil action instituted in McDowell County, the county of plaintiff's residence, to recover for rent due on land situate in Buncombe County.

Motion by defendants, after filing answer, to transfer cause to Buncombe County for trial as the proper venue for said action, in that, it is alleged, the action is to determine some right or interest in real estate, or for the recovery of personal property. C. S., 463. Motion overruled. Defendants appeal.

Winborne & Proctor for plaintiff.

Vonno L. Gudger, Kitchin & Kitchin and J. Scroop Styles for defendants.

PER CURIAM. A careful perusal of the record fails to manifest any error in the ruling of the trial court. *Causey v. Morris,* 195 N. C., 532, 142 S. E., 783; *Carnegie v. Perkins,* 191 N. C., 412, 131 S. E., 750.

Affirmed.

KUGLER LUMBER COMPANY v. SAMUEL W. LATHAM ET AL.

(Filed 10 December, 1930.)

APPEAL by defendants from *Nunn, J.*, at May Term, 1930, of BEAUFORT.

Civil action for trespass.

Judgment for plaintiff. Damages assessed at five cents. Defendants appeal.

H. C. Carter for plaintiff.

A. W. Bailey and L. M. Scott for defendants.

PER CURIAM. Dismissed on authority of *Pruitt v. Wood, ante,* 788, for failure to comply with rules 27½ and 28. 192 N. C., p. 852.

Motion for new trial on ground of newly discovered evidence denied. *Johnson v. R. R.,* 163 N. C., 431, 79 S. E., 690.

Appeal dismissed.

STATE v. BILL SCOGGINS.

(Filed 10 December, 1930.)

APPEAL by defendant from *Moore, J.*, at April Term, 1930, of POLK.

Criminal prosecutions tried upon indictments charging the defendant (1) with having and keeping in his possession spirituous or vinous liquors for the purpose of sale (C. S., 3379) and with transporting the same (C. S., 3411(b), and (2) with resisting an officer in violation of C. S., 4378.

From an adverse verdict on both indictments, and judgments of eighteen months on the roads on each indictment, to run concurrently, the defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Quinn, Hamrick & Harris and J. S. Dockery for defendant.

PER CURIAM. A careful examination of the records reveals no reversible error committed on trial. The cases are simple and involve no new question of law. It would serve no useful purpose to set out the evidence.

No error.

APPEALS FROM SUPREME COURT OF NORTH CAROLINA PASSED UPON IN SUPREME COURT OF THE UNITED STATES

Harry E. Cole v. Seaboard Air Line Railway. Petition for *writ of certiorari* denied.

W. C. Clark v. A. J. Maxwell, Commissioner of Revenue for State of North Carolina. Judgment affirmed.

APPEALS FROM SUPREME COURT OF NORTH CAROLINA PENDING IN SUPREME COURT OF THE UNITED STATES

Hans Rees' Sons, Inc., v. State of North Carolina *ex rel.* A. J. Maxwell, Commissioner of Revenue.

Great Atlantic and Pacific Tea Company *et al.* v. A. J. Maxwell, Commissioner of Revenue.

APPLICATION FOR LICENSE TO PRACTICE LAW

NOTICE GIVEN BY APPLICANTS FOR LAW LICENSE

As a condition precedent to his right to apply for license, every applicant for license to practice law in this State, either under the Comity Act or by taking the prescribed examination, shall notify the Clerk of his intention to become an applicant on or before noon of the 15th day of December next immediately preceding the January examination if he wish to apply for license at the January examination, and on or before noon of the 15th day of July next immediately preceding the August examination if he wish to apply for license at the August examination. This notice must be in the Clerk's office within the time specified, and mailing it in time to reach his office will not suffice unless actually received by him before the expiration of the time herein designated.

PRESENTATION OF THE PORTRAIT

OF THE LATE CHIEF JUSTICE OF THE SUPREME COURT

WILLIAM ALEXANDER HOKE

BY

HAMILTON C. JONES

2 SEPTEMBER, 1930

It is a rare privilege that has fallen to me to be commissioned by the family of Chief Justice William Alexander Hoke to present to you a portrait of this distinguished jurist and North Carolinian, that his picture upon these walls may be a constant reminder of his sterling character, lovable nature, rare virtues and large accomplishments. I, therefore, present this likeness that it may be a pole star to the Bench and Bar of North Carolina as they come into this historical room and Court, to carry on the work that the subject of this portrait was so illustriously engaged in for a period of twenty years, inspiring them to emulate his great example, and furnishing as it will, a fitting and perpetual memorial to his transcendent ability and masterful contributions to the jurisprudence of North Carolina. Few men in the public life of North Carolina have ever received from its people a greater love or a higher regard, than this eminent Judge and lawyer.

William Alexander Hoke was born at Lincolnton, North Carolina, 25 October, 1851, and died at Raleigh, North Carolina, 13 September, 1925. He was the only son of John Franklin Hoke and Katharine Wilson Alexander, who was the eldest daughter of William Julius Alexander and Elvira Katharine Wilson, Judge Hoke being the great grandson of the Revolutionary hero, William Lee Alexander and Elizabeth Henderson. His family on both sides has been influential in the public affairs of the State and country for many years.

The Hokes were among the virile leaders of the Democratic party in the '40's and '50's and their leadership, together with other outstanding men in the party brought it from a minority to a majority party that has controlled the State for many years. In fact, with few lapses, the Democratic party has been in control since Michael Hoke stirred the State in his unsuccessful campaign for Governor. The Democracy of the Hokes was deep-rooted and founded upon the principle of equal rights to all men and hostility to every form of tyranny.

Colonel John Franklin Hoke, his father, was Adjutant General in North Carolina in 1861, later Colonel of the 30th Regiment and was advanced finally to the rank of Colonel of the 23d. His father's nephew was even more distinguished, being the late General Robert F. Hoke, one of the bravest and most brilliant Major-Generals in the Confederate Army. Colonel Hoke, it was said, recalled with much pride how his son, Alex, who was then only nine years old, and filled with martial ambition, insisted upon accompanying his father to the front. Colonel Hoke was the leader of the bar in Lincoln and adjacent counties, but like his distinguished nephew, Robert, preferred private life to public office.

On his maternal side, his ancestors were among the outstanding leaders of the State, reaching back to pre-revolutionary days. His grandfather was William Julius Alexander, one of the most brilliant lawyers of his day, his great-grandfather being Hon. Joseph Wilson, one of the most powerful lawyers and solicitors of Western North Carolina. His great-great uncle, was Nathaniel Alexander, of Mecklenburg County, elected Governor of North Carolina in 1805, a graduate of Princeton University and the only doctor of medicine to hold the office of Governor in the history of the State, his death on 7 March, 1808, at the age of fifty-two years, ending a most promising career. So his mother's people, like the Hokes, were brilliant leaders in the public and professional life of their day, his forbears being makers of history on both his maternal and paternal sides.

On 16 December, 1897, Judge Hoke was married to Miss Mary McBee of Lincolnton, North Carolina, a charming woman of a distinguished family, and it was a particularly joyful event that their wedding was the golden anniversary of the wedding of the parents of Mrs. Hoke. This marriage was an ideally happy one, and their home a center of culture and charm until her death in 1920. There was born of this union one daughter, Mary McBee, who was a charming and devoted companion of her father from the time that she was a tiny girl until the day of his death. No companionship could have been closer or dearer than that existing between this adoring father and devoted daughter.

At the end of the war, William Alexander Hoke was fourteen years old, and from that time until he reached his majority, was raised and instructed in that period of reconstruction which molded so many men of fine character and genius to later serve their State and nation.

After receiving his early education, Judge Hoke entered upon the study of law, having the privilege of being a student and sitting at the feet of that great lawyer and trainer of so many brilliant members of the North Carolina Bar, Chief Justice Pearson, who conducted a law school at Richmond Hill, North Carolina, and was admitted to the bar on his twenty-first birthday, 25 October, 1872. After securing his license, Judge Hoke practiced law at Shelby for a time and later at Lincolnton. During this period and until 1891, when he was elevated to the Superior Court Bench, Hoke was one of the outstanding lawyers and practitioners in the Piedmont section of North Carolina. He early showed unusual legal talent and an exceptional mind, rare traits of character and above all, a personality that radiated respect and love in every circle in which he moved.

LEGISLATOR.

In 1889, he was nominated by his county for the House of Representatives in Raleigh. At that time, it was the custom for the Democratic and Republican candidates to have joint debates, and the joint discussion between Judge Hoke and his Republican opponent is one of the most interesting events in Lincoln County's history. His opponent was a very active, shrewd and militant politician, but lacked the poise and presence on the public platform that Judge Hoke possessed to such a marked degree. This lack of poise Judge Hoke discerned as his greatest weakness, and after their first debate he began to play upon this chord in a most able manner, in fact, it is said by those who heard the debate, that no actor could have beaten Judge Hoke in disarming his opponent. After his antagonist had spoken in the usual fervid political style, Judge Hoke arose to speak with the greatest dignity. It was said that he really rose higher than his natural height and hesitated almost minutes before making any remarks whatever. He realized that dignity and presence were among his best weapons in this debate and it is said that even before he uttered a word, his opponent was routed by the contrast the two men presented on the platform. It is needless to say that he won in this election and came to the General Assembly in the year 1889.

There were important questions before the Assembly in this critical period, and before the close of the session, by the common consent of all, although serving his first term, he won a place among the ablest and wisest leaders of that body, being chairman of the important Judiciary Committee. No legislator in this generation showed a greater mastery of the problems that he was helping to solve. His information was full and accurate, his logic unanswerable and his expressions direct and able, and with these qualities he won many a victory over older members of the Legislature. Here he exhibited for the first time in the affairs of the State, the courage and wisdom which afterwards developed and ripened in passing years to such a marked degree. Indeed, his exhibition of fine legislative qualities caused him to be frequently mentioned as ideal Representative in the United States Senate from the State of

North Carolina, although it is well known that he did not himself seriously entertain this ambition.

The State Chronicle in speaking of him as a legislator, said: "He was a leading member of the last North Carolina House of Representatives and made a reputation second to that of no member of that body. . . . Alexander Hoke will attain high honors, and we predict that he will be Governor of North Carolina."

It is an interesting incident that during this campaign of 1888 for the Legislature, the Democrats, as a feature of the campaign, staged a large horseback parade in the town of Lincolnton, and Alex. Hoke, being one of the candidates for the Legislature, occupied a conspicuous place in the parade. It seems that his father, returning from court at Shelby the day of the parade, arrived just in time to view the Democratic display, and stepped out on the porch of his residence on Main Street for this purpose, and as the parade passed by waved his hand to his son in the procession and suddenly breathed his last, passing into the great beyond and leaving behind him a fine contribution to the many splendid public achievements of this great family.

SUPERIOR COURT JUDGE.

In 1890 Judge Hoke was nominated for the Superior Court Bench at a notable convention at Lincolnton. It was one of the most exciting and hotly contested convention nominations in the history of Piedmont Carolina. The candidates were W. A. Hoke, of Lincoln; M. H. Justice, of Rutherford, and John Vann, of Union, three brilliant lawyers and outstanding leaders of the bar in Piedmont Carolina. The district embraced Union, Mecklenburg, Gaston, Lincoln, Cleveland, Rutherford and Catawba counties. Judge Burwell, of Charlotte, was the campaign manager and floor leader at the convention for Mr. Vann, being his former law partner. Judge Burwell carried two-thirds of the Mecklenburg delegation for Mr. Vann for more than sixty-five ballots. One-third of the Mecklenburg delegation was headed by Mr. E. T. Cansler, Sr., of Charlotte, who was one of the leaders for Judge Hoke, and made a brilliant speech seconding Hoke's nomination, Captain Hoyle, of Cleveland County, making the nominating speech. Hoke had the vote of Lincoln, some of Cleveland, and some of Gaston. Justice had the vote of Rutherford, some of Cleveland and of Catawba; Vann the vote of Union and part of Mecklenburg. The contest was long and fiercely waged, taking sixty-six ballots to make the choice, although Hoke lacked only twenty votes of being nominated after the first few ballots. The crisis came when that distinguished citizen of Mecklenburg, Judge Burwell, stated to those of the Mecklenburg delegation who had voted solidly and consistently with him for Vann, that they could vote for whom they pleased, but as for him, he would cast his vote for Hoke. On this statement from their leader, the entire Vann wing of the Mecklenburg delegation joined the original Hoke delegation, and he was nominated on the next ballot.

Judge Hoke took his seat in January, 1891, on the Superior Court Bench. This was in the good old days when sectional division did not deny to all portions of North Carolina the privilege of having Western judges hold court in the Eastern counties and *vice versa*. Had the present rule of dividing the State prevailed, one-half of our State would have been deprived of the fine judicial attainments of this great lawyer as a *nisi prius* judge in North Carolina. It is a possibility that he would not even have been elected to the Supreme Court Bench because his gifts would not have been so well known to the whole State. He was a splendid Superior Court judge and ranked as high in the opinion of the members of the bar and people of this State as any man who ever held this exalted position, which wields such a large and wholesome influence in the life of our State.

Judge Hoke greatly endeared himself to the people of the State, especially to the members of the legal profession. He inspired in them the greatest respect and admiration, and at the same time a feeling of tenderness that was little removed from love. No man ever sat on the bench of North Carolina who enjoyed or deserved in greater measure, the love and affection of the people of the State. He held court in practically every county in North Carolina during his fourteen years on the Superior Court Bench, from the mountains to the sea, and left indelibly impressed upon the hearts and minds of thousands of his fellow-citizens an abiding and affectionate recollection of his kindly manner and wise counsel. As Chief Justice Stacy aptly expressed it, in his splendid address on Judge Hoke before the North Carolina Bar Association, "His striking appearance and military bearing at once arrested attention and commanded respect wherever he went."

He fully met the requirements of a "good judge" according to the recital made by Rufus Choate in the Massachusetts Constitutional Convention of 1853: "In the first place, he should be profoundly learned in all the learning of the law, and he must know how to use that learning. In the next place, he must be a man, not merely upright, not merely honest and well-intended—this, of course—but a man who will not respect persons in judgment—and finally, he must possess the perfect confidence of the community, that he bear not the sword in vain."

Alex. Hoke held this important office of Superior Court judge at a critical time in the history of the State, from 1890 to 1904, as fittingly set forth in resolution adopted by the Raleigh Bar Association on the death of Judge Hoke, the resolution speaking as follows: "What testing years these were in the life of the State. Legal learning was not sufficient to qualify a man for the judgeship in those days. There was needed an experience which ran back to the reconstruction era, a sympathy that could compass the yearnings, difficulties and aspirations of a struggling people and an integrity that could withstand the fires of intense partisanship. Judge Hoke possessed these qualities in the highest degree; and withal, he had that rarest of gifts, personal charm. Judge Hoke well understood human weaknesses; he did not claim to be free from them himself. He was just and firm in his dealings with the offender, but his was ever a gospel of the second chance. He understood the philosophy of the poet who wrote:

'In men whom men condemn as ill,
I find so much of goodness still;
In men whom men pronounce divine,
I find so much of sin and blot,
I hesitate to draw the line,
Between the two, where God has not.' "

During this long period of service on the Superior Court Bench, there were many interesting incidents which suffice to show his great courage, fairness and rare sense of humor, but in the economy of time, only two of these occurrences can be referred to. An incident showing his dauntless courage and firm decision was tersely and graphically described by Judge Stacy in his address previously referred to, describing the occurrence as follows: "A negro was brought into his court, charged with a capital assault upon a white woman. There was much excitement in the community over the occurrence. The crime had been committed only the day before. The defendant lodged a motion for a continuance upon the ground that he had not had time to summons his witnesses or to get ready for trial. It was suggested that a lynching would probably take place if the case were not tried at that term of the court. To this the judge promptly replied: 'If there is to be any violence, it is better for the prisoner to be lynched by the mob than to be mobbed by the court.' This nugget of truth and wisdom, so tersely and epigrammatically expressed, attracted the immediate attention of the whole State and country at large. The case was continued for a week, the defendant given the opportunity to prepare his defense, and there was no lynching."

An incident showing his superb humor and his appreciation of a joke on himself was referred to and humorously expressed by Judge Murphy in his address before the North Carolina Bar Association at Wrightsville Beach in June, 1926, Judge Murphy using the following language in narrating the experience: "He told me he was trying an insurance case in Perquimans County or Hertford County—I forgot which—where the plaintiff had brought an action on a fire insurance policy for the destruction of a storehouse. The amount involved was $2,500. After the evidence was all in, Judge Hoke reached the conclusion that under the facts and the law and the conditions of the policy, that the plaintiff was not entitled to recover. He so told the jury. The jury went out and stayed a few minutes and brought back a verdict of $2,500. Judge again directed the jury how to answer the issue, and in a few minutes they brought back a verdict of $1,250. He again sent the jury to their room, with the same instructions, and they returned with a verdict of $625. By this time Judge Hoke was mad, and told the foreman of the jury, "Give me that issue, I'll answer it myself." With great humility, smiling, the foreman said, "That's all right, Judge, we will answer it. We all agreed in the jury room that if you did not back down this time, we would."

That he was held in the highest esteem by the members of the bar and the citizens of North Carolina throughout the length and breadth of the State, is attested to by the many fine compliments that were paid him by the press as he went into one county after another winning the high regard and love of the people of his native State in all sections. In the interest of brevity, I will only quote from the *Cleveland Star* of 27 October, 1897, which had this to say of the subject of this sketch: "Cleveland Superior Court is in session this week and that able and learned jurist, Judge W. A. Hoke, of Lincolnton, is presiding with characteristic ability and fairness. In times when unworthy men have been elevated to office and the standard of the judiciary lowered in consequence, it is really refreshing to have such an ideal judge as the presiding officer at this court to visit our county. Conceded on all sides to be one of the ablest and purest judges in this State, Judge Hoke is also one of the noblest and truest of men, and to paraphrase the poet's words,

> 'Grecian chisel never traced
> A manlier form or kindlier face.'

Honest, able, fearless, kindhearted and absolutely incorruptible, Judge Hoke wears the judicial robes with becoming fitness."

Articles equally as complimentary of Judge Hoke appeared in the papers throughout North Carolina in every section during this period that he was impressing the State and its people so favorably.

Alex. Hoke was so popular in Mecklenburg County and his association through kinship and otherwise so identified with it, that when the committee in charge of dedicating the new courthouse which was built in Mecklenburg County in 1896, and which was dedicated on 2 October, 1897, was looking around to select the proper judge to preside over the dedication exercises, there was but one judge in the State who properly fitted in the picture. He was William Alexander Hoke. It was so arranged with the Governor that he would be on hand for these very important exercises. So on this date, with great dignity and appropriate exercises Judge Hoke conducted the dedicatory proceedings with such men as Judge Armistead Burwell, Hon. Clement Dowd and the late Hamilton C. Jones, making interesting and thoughtful addresses; his fitness for this task being aptly described by Colonel Jones in his brief remarks, who in speaking of Joseph Wilson, the great-grandfather of Alex. Hoke, says: "He was an ancestor of that distinguished gentleman who presides here today, and whom we are proud of as our judge. We recognize his great ability and his aptitude for this position. He would have had less excuse for not being a great lawyer than any man of my acquaintance." As a climax to the exercises, Judge Hoke made a brief but able address in which he exhibited one of his outstanding qualities which made him a big man, that is, innate modesty, speaking in part as follows: "For I tell you, my countrymen, that it is a precious thing to wear the regard of this bar and this people. . . . You stand now where you have stood, in the forefront of what is best and noblest in our civilization, and if I have been enabled to fill this high office acceptably, to which your kindness has preferred me, and to accomplish some good in its administration, which my brethren here so kindly stated in your hearing, it is in no slight measure due to the fact that I have had the assistance and association of a trained, capable and patriotic bar, and the inspiration and approval of an intelligent, earnest-minded and sound-hearted people. It is a great honor to be the chosen judge of such a people, and it is a reward greater than I deserve to wear their esteem and approval."

The press of the State during the time of his encumbency on the Superior Court Bench was replete with high compliments and commendation for the subject of this sketch. The excerpts from papers throughout the State in Western, Piedmont and Eastern North Carolina such as the typical ones recited heretofore show lustrously the splendid impression made by Judge Hoke as a *nisi prius* judge and the high esteem and love that the people of his native State held for him. These articles written at the time of his gripping hold on the State and these occasions such as the dedication of the Mecklenburg County courthouse occurring in this important period in the State's life, are true barometers of public opinion and express accurately the pulse of the people. They indisputably prove that the bar and the people of his State recognized him as the embodiment of the hopes and ambitions of the people and as a trial judge without superior in the State's history. The average man loved and admired him and hesitated not to show it.

For fourteen years he held this important and exalted position with rare ability, impartiality and learning. Inflexible honesty, dauntless courage, mastery of law, love of justice and loftiness of character moulded this outstanding *nisi prius* judge as the idol of the people, and they sustained an irreparable loss when he stepped from among them to a more exalted position on the Supreme Court of North Carolina. Through the various channels of the people of this State, "He sailed an unvarying course, towards truth, honor and justice."

In 1904 at a spirited convention in Greensboro, Judge Hoke was nominated by the Democratic party for Associate Justice of the Supreme Court, winning the nomination over Judge M. H. Justice of Rutherfordton, and being elected in the fall of that year. Hoke sat as Associate Justice of the Supreme Court from the Spring Term of 1905 until the Spring Term, 1924, and as Chief Justice of the Supreme Court from 2 June, 1924, until his resignation on account of ill health on 16 March, 1925, then becoming an Emergency Judge. During this long period of distinguished service, he wrote a mass of opinions, enunciating legal principles and doctrines that are the foundation of the law of North Carolina on many important subjects. From the 137th to the 189th North Carolina Reports, inclusive, the opinions of Justice Hoke are to be found, covering a wide range of subjects and erecting for him a monument which will be an everlasting tribute to his brilliant intellect, his deep-rooted sense of justice and his almost uncanny appreciation of the hopes and aspirations of the people of his State.

His style always trenchant and forceful, characterized at all times by accuracy and facility of expression, cuts to the heart of the subject and gives his opinion an elucidation and clearness which leaves no vestige of doubt as to the principle of law that he is enunciating. His style seems to have been an inherited one, as it was displayed from the time that he was assigned his first opinion at the Fall Term of 1905 until his resignation from the Bench during the Spring Term of 1925. His opinions are always incisive and essentially just and show that at all times he was appreciative of the people's rights and guarded them diligently.

One of his first opinions, *Jones v. Commissioners,* 137 N. C., 579, filed 28 March, 1905, is written in strong, lucid style, and holds that it is a matter of vital importance that the good name and credit of a county be jealously guarded, construing "authorize and empower" in the statute to be mandatory upon the commissioners of Madison County to issue bonds to fund accrued indebtedness for necessary expenses.

Next in *Fayetteville Street Railway Company v. Railroad,* filed 30 October, 1906, 142 N. C., 423, he wrote a vigorous opinion, holding that that railway company first locating its line had the right of way over all contesting lines, irrespective of whether or not rights of way had been secured from the property owners by the contesting companies. This was an important decision, in that it settled the law as to the rights of the public railway companies and the landowners.

In *Corporation Commission v. Manufacturing Company,* 185 N. C., 17, he handled this important litigation between the Southern Power Company and a number of leading cotton mill owners in a very skilled manner, writing a strong opinion recognizing the absolute right of the electric power company to charge rates that are reasonable and just, at the same time definitely holding that the Corporation Commission had the absolute power to fix rates on electricity generated in another State, transported to this State, distributed and sold here. In this opinion he showed his facility as a writer and his power to express in ornate language sound legal principle, "There must be the strict guardianship by the State outlined by statute and enforced by judicial and administrative officials, to protect for public use the bounty of heaven, whether folded in the recesses of the earth, laid up from countless ages for the benefit of future generations of men, or created by the waters falling from the skies from which power is made for the necessities of men."

In *Small v. Morrison,* 185 N. C., 579, filed 8 June, 1923, we find him holding that it is against the policy of the law to permit an unemancipated minor child to sue his father for personal injury, speaking eloquently in this opinion of the sanctity of the home.

In *Citizens Company v. Asheville Typographical Union, No. 263,* filed 22 January, 1924, 187 N. C., 42, we find him concurring in the opinion of the Court written by *Judge Clarkson,* expressing boldly his views with reference to the right of employer and employee in labor crises.

Other cases of public interest are *Becton v. Dunn,* 137 N. C., 559; *May v. Loomis,* 140 N. C., 350; *Broadstreet Bank v. National Bank of Goldsboro,* 183 N. C., 463; *Yellow Cab Company v. Creasman,* 185 N. C., 48, and *Lacy v. Indemnity Company,* 189 N. C., 24.

In criminal cases his opinions exhibit a strong desire to give each citizen a fair and impartial trial, at the same time showing a determination to punish those who have flagrantly and intentionally violated the laws of the land, and to discharge those who have unintentionally infringed upon some statute.

Two cases written soon after his entrance upon the Supreme Court, illustrate this attitude clearly. In *S. v. Exum,* 138 N. C., 599, a case of deliberate murder where Exum killed his step-son without any excuse whatsoever, he affirms in an able opinion the judgment of the lower court in finding the defendant guilty of murder in the first degree, holding that previous threats made by the prisoner against the deceased are competent. On the contrary, in *S. v. Horton,* 139 N. C., 589, showing his even sense of justice, he was equally as aggressive in holding that unintentional homicide should go unpunished. In the particular case, Horton had killed a man, mistaking him for a wild turkey while hunting on land without a permission.

In *S. v. Barksdale,* 181 N. C., 621, he showed his unwillingness to be influenced by press reports or public demand. Here he said, "More important even than a prohibition law, is the constitutional principle, which guarantees to every citizen charged with crime, an impartial and lawful trial by a jury of his peers."

In addition to these opinions, *S. v. Hardin,* 183 N. C., 815, *S. v. Springs,* 184 N. C., 768, all show his ability as judge of the criminal law and his devotion and regard for the Constitution of North Carolina and of the United States.

In the field of negligence, he wrote some very able opinions, establishing for our State principles of law governing the relationship of master and servant which are absolutely fair to both sides of this equation: *Hicks v. Manufacturing Company,* 138 N. C., 319; *McKinney v. Allen,* 185 N. C., 562; also very frequently ably discussing general rules of negligence; *Cooper v. Railroad,* 140 N. C., 209.

He was a master of real property and raised during that period when this branch of the law was the most important in the field of practice in this jurisdiction, as attested to in the cases of *Gaylord v. Gaylord,* 150 N. C., 222; *Christopher v. Wilson,* 188 N. C., 757; *Wallace v. Wallace,* 181 N. C., 158; *Pou v. Allen,* 179 N. C., 307. The deliberation and logic of his mind was well suited to consider and solve the abstruse problems of real property and with him it was not a difficult task because of his knowledge of the old masters, Blackstone, Coke and Littleton.

I have dwelt at some length upon the decisions of Judge Hoke, covering his long period of service on the Supreme Court Bench as showing his fine judicial temperament, matchless sense of fairness, intense humanity and his passion that all men in the State of all classes should receive equal and exact justice before the law.

In his long career on the Supreme Court Bench, he served with Clark, Walker, Brown, Henry Groves Connor, Manning, Allen, Stacy, Adams, Clarkson and George W. Connor, all men of strong convictions who hesitated not to clash sharply with him in their views of the law on any particular subject, yet maintained at all times the most cordial personal relations with their associate and he enjoyed to a remarkable degree their love, admiration and respect. He was a member of that great quintet of Judges who held sway upon the Supreme Court of North Carolina with such signal distinction—Clark, Hoke, Connor, Walker and Brown;

a Court which was famed throughout the nation as one of the ablest appellate Courts of any State in the Union. He was the last survivor of this brilliant Court, for when he resigned on 16 March, 1925, as Chief Justice, only one of this great coterie of jurists, Judge George H. Brown, was living at that time, and he had previously retired from the Supreme Court Bench.

It is interesting and at the same time sad to note that while Chief Justice, Judge Hoke had the honor of accepting the portrait of Chief Justice Clark which was presented to the Supreme Court on 28 October, 1924, and just about a month thereafter, on 25 November, 1924, received for the Court the sad news of the death of his devoted friend and associate, Judge Henry Groves Connor, Ex-Associate Justice of the Supreme Court of North Carolina and of the District Court of the United States.

CHIEF JUSTICE.

When William Alexander Hoke was appointed Chief Justice by Governor Morrison, there was never a more popular appointment made in the State. It was the universal opinion that there was but one man who should be appointed Chief Justice, and he was Judge Hoke. One has but to read the mass of letters and telegrams sent from all parts of the State, from the judiciary, the bar and the leading citizens, to appreciate the universal sentiment that here was the rare occasion where the office absolutely fitted the man. Possessing unusual native ability, having served on the Superior Court and the Supreme Court of North Carolina for thirty-four years, with rare distinction, commanding the highest esteem of his fellow-citizens, Hoke was the only logical choice for Chief Justice. It is impossible to quote at any length from the mass of editorial comment and laudation of Judge Hoke as it appeared in the press of the State, and a still more difficult task to give mention to the hundreds of personal letters that came to Judge Hoke and his family both strongly endorsing him for Chief Justice, and after his appointment, commending the wisdom of the choice.

The editorial in the Raleigh *News and Observer,* 3 June, 1924, published in the city in which he had resided for twenty years, is typical of the universal approval of his appointment throughout the length and breadth of the State, said article reading in part as follows: "It is hardly possible for Judge Hoke to add any new laurels to his judicial career, which has been one of great usefulness to the State, but the people are fortunate in having a man of such wisdom and discretion at the head of the State's most important Court. He will direct its deliberations always with a view to serving the interest of the people."

Articles just as commendatory of the appointment appeared in practically all of the leading newspapers of the State.

HONORED AS A CITIZEN.

Judge Hoke was the recipient of many honors as a citizen independent of his activities as a lawyer and his long service upon the Superior and the Supreme Courts of his native State. He was chairman of the commission to place a suitable statue of the great North Carolina statesman, Zebulon Baird Vance, in Statuary Hall, in the city of Washington. Probably nothing in his life outside of his absorption in his judicial duties ever interested him more, and his diligent and able efforts resulted in the erection of a suitable statue to Vance. Vance was the ideal statesman to Hoke, and it was a privilege to him to answer the call and to preserve his form in the forum of his country where Vance had served with such brilliance and outstanding leadership for so many years. In the unveiling and presentation of this statue, 22 June, 1916, in Statuary Hall, Judge William Alexander Hoke made the following remarks about Vance: "As a man amongst us who preëminently fills the requirements of the act of Congress dedicating this Hall to the good and great men of the nation . . . an illustrious citizen, distinguished for civic and military virtues. He was indeed, my countrymen, a great leader of his people in war and peace; great in intellect, great in character and achievement, great in breadth and quality of his sympathy. His people followed him with unfaltering trust for more than thirty of the most eventful years of their history and were not disappointed. They admired and loved the man for his integrity and his courage, for his wisdom and strength, his genius, his matchless eloquence and far-seeing vision, for his loyal-hearted, unchanging devotion at all times and under all circumstances to their best interest as he was given light to see it. His hold upon the affections of the people of North Carolina endures and grows stronger with time, and we are deeply gratified to have you with us here today in paying this tribute to his memory."

Hoke venerated and admired Vance, and it was one of the greatest satisfactions of his life that he took so large a part as head of the commission in placing in Statuary Hall at the Capitol an image of Vance, the great North Carolina leader whom he loved and followed. Knowing then his devotion for and his admiration of Vance, it is not surprising that five minutes before he passed into the great beyond sitting in his chair at the Rex Hospital, he was telling the house physician the high day in his own life when he had been privileged to honor Vance. This was not a reference to his important part in securing the statue, but rather rejoicing that he lived to see the State honor its distinguished citizen. He was giving in detail the reasons for the high place that Vance occupied in the history and the hearts of the people of North

Carolina, when without pain he passed into eternal companionship with the only man in his long career to whom he had given absolute and wholehearted allegiance as a leader.

HONORARY DEGREES.

Two great institutions of learning in North Carolina conferred the honorary degree of Doctor of Laws upon the distinguished subject of this sketch in appreciation of his eminent service as a judge and his understanding and leadership as a citizen. Dr. C. Alphonso Smith, the former dean of the Graduate Department at Chapel Hill, in conferring for the University the honorary degree of Doctor of Laws upon Judge Hoke, which took place at Chapel Hill in June, 1909, said in part: "Judge Hoke has exemplified and exhibited in every position that he has filled, those qualities of head and heart which North Carolinians love to honor. To strong convictions he adds the faculty of putting himself in others' places so that prejudice is disarmed and justice is tempered with understanding. His ingrained honesty, his judicial poise, his wide charity of hand and thought, and his sense of stewardship as man and as citizen commend him as peculiarly worthy of the distinction which we today confer upon him."

Justice Hoke was also signally honored by that great Presbyterian Institution, Davidson College, who likewise conferred the honorary degree of Doctor of Laws upon him because of his distinguished service on the Bench and his fine contribution to the laws of the State of North Carolina.

CHURCHMAN.

Judge Hoke was a staunch Episcopalian throughout his life. He was ever active in the affairs of his church and honored by it. He served for many years as Vestryman of St. Luke's Episcopal Church at Lincolnton, and was elected by it Honorary Senior Warden for life after his removal to Raleigh. In Raleigh, he attended the Church of the Good Shepherd and was one of its strongest supporters, but never moved his membership to the church at Raleigh because of his sentiment about the church of his nativity, St. Luke's Episcopal Church at Lincolnton. He and the Right Reverend Joseph Blount Cheshire, Bishop of North Carolina, were intimate friends for many years, and this venerable and beloved North Carolinian, relied upon Judge Hoke as one of the strongest laymen in his Diocese.

DEMOCRAT.

William Alexander Hoke was a militant, loyal Democrat all of his life. He followed the trail blazed by his distinguished ancestors, the Hokes, who were for so many years virile leaders of the Democratic party, and whose wise counsel was most influential in bringing the party from the minority to the majority party in the State. His long service of thirty-four years on the Bench naturally prevented his active participation in the campaigns, but his party felt at all times that in Alex. Hoke it had a loyal supporter and friend and wise counsellor so far as was consistent with the dignity of his office. Before entering upon the Bench, he was a strong, virile Democrat and hesitated not to draw swords with an adversary if it meant the maintenance of party principle. Zealous as he was for the Democratic party, however, he commanded at all times the respect, regard and real affection of thousands of citizens of North Carolina, who disagreed with him in party affiliation. Judge Hoke's love for Jeffersonian principles was so profound that tempting offers of support from opposing parties always fell upon deaf ears with him.

MEMBER OF THE SOCIETY OF CINCINNATI.

On 4 July, 1902, William Alexander Hoke was admitted into the distinguished Society of Cincinnati, being a representative of Lieutenant William Lee Alexander, of the Fourth Regiment of North Carolina Continental Infantry, an original member of the Society. From the time of his admission, Judge Hoke took an active part in the meetings of the Society and gave it the benefit of his strong mentality and warmth of patriotic fervor. At all times, he was intensely interested in the aims and purposes of this historic organization and was a worthy representative of his distinguished ancestor in the Society of Cincinnati until the day of his death.

DEVOTEE OF LITERATURE.

Judge Hoke "loved the best literature and made of himself a man of letters as well as of legal lore." His public utterances and private conversation distinguished him at once as a man who was well versed in the classics, and who had given literature and literary style intense study and observation all of his life. His opinions are inoculated with a classic style and his facility of expression couched in splendid English, at times almost quaint, indicates a mind that has spent long hours of study in perusing classical literature. At the same time, he was devoted to literature of a light character, and never was more pleased than to be able in conversation to give expression to some little verse that expressed a bright thought appropriate to the occasion. Dr. Archibald Henderson, of the University, a close friend of Judge Hoke, in his later years, stated to me that he never met his distinguished friend without his giving expression to some new limerick or verse that he had heard which appealed very much to his sense of rhythm and humor. The requirements of the Bench never prevented Judge Hoke from developing through the years his literary attainments.

What a life, so fruitful of result! William Alexander Hoke, a devoted husband and father, distinguished citizen, brilliant lawyer, wise legislator, exponent of rare literary style, faithful churchman, Judge of the Superior Court for fourteen years, Associate Justice of the State Supreme Court for more than nineteen years, and Chief Justice for almost a year, faithful in every trust, a signal success in every stage of his career; an idol of the people and the embodiment of their hopes and aspirations. Truly here was a prince among men, giving to his State a life that will be a benediction to all of its citizens who observe and follow his illustrious career.

As was said by Chief Justice Stacy in the address previously referred to, "So long as the establishment of justice shall remain the end of all government and so long as men everywhere shall continue to seek the right, he will ever live with the deathless dead for in the temple of the law he hath builded for himself a monument more lasting than marble and more enduring than bronze. His epitaph is written in his own hand and will be found in the North Carolina Reports." They breathe the spirit of justice and illustrate the truth. "For justice, all seasons summer, and every place a temple."

It is tradition that "The native hunter in the Indian jungle discovers by unmistakable signs when the king of the forest has passed by. So the lawyer when he runs through the pages of the North Carolina Reports and comes upon the opinions of William Alexander Hoke, he instantly perceives that a lion has been there."

Strong, brilliant, just, courageous, lovable, with unswerving loyalty, there met in him the qualities of true greatness. "A great man is made up of qualities that meet or make occasions." He set for the people of his State a noble example that will live in the years to come and guide them to the higher and better things as they come under the influence of his brilliant career. "Great men stand like solitary towers in the city of God," their achievements flashing to the world an example and ambition to be aspired to by the generations yet to come. His work upon this earth is past, but his great influence will continue through eternity.

"Nothing can cover his high fame but heaven;
No pyramids set off his memories,
But the eternal substance of his greatness—
To which I leave him."

REMARKS OF CHIEF JUSTICE STACY, UPON ACCEPTING PORTRAIT OF FORMER CHIEF JUSTICE WILLIAM ALEXANDER HOKE, IN THE SUPREME COURT ROOM, 2 SEPTEMBER, 1930

The Court is pleased to have this portrait of its late Chief Justice, and it has heard with fullest sympathy the splendid address of presentation made by his friend and ours.

William Alexander Hoke is one of those names for which no death lies in wait. It denotes a spirit, at once courageous and true, still vibrant in these halls. Here it lived with its fleshly screen. Here it lives with its finer body. Its voice is the voice of law, and it speaks from fifty-three volumes of our published Reports.

To those who did not know him, words of just appraisal must seem but the fulsome praise which custom decrees shall be accorded the dead. But for the profession he served so long and well, and for those of us whom he honored with his friendship, his work will stand as his monument, more enduring than granite, more precious than refined gold, for it has been wrought into the temple of the law of a great people. He put all of his powers to a noble task, hammered out a compact and solid piece of work, made it first rate, and left it unadvertised.

Faithful over a few things; ruler over many.

There is a space reserved for his portrait on the walls of this Chamber. The Marshal will see that it is hung in its proper place. The proceedings on this occasion will be published in the forthcoming volume of our Reports.

INDEX.

ABANDONMENT—Wife a free trader after, see Husband and Wife D d 1, 2.

ABATEMENT AND REVIVAL.

C Death of Party and Survival of Action.

a Actions for Negligent Injury

1. The fact that the injury in suit did not cause the death of the injured party, but that death resulted from another cause does not now prevent the survival of the action under the amendment of Public Laws 1915, ch. 58, C. S., 159, 162, 461, 462. *Fuquay v. R. R.*, 499.

ACKNOWLEDGMENT see Deeds and Conveyances A f.

ACTIONS—Parties see Parties; consolidation of criminal actions see Criminal Law I f; process see Process; trial of, see Trial.

ADVERSE POSSESSION (Creation of easements by, see Easements A a).

A Nature and Requisites of Title by Prescription.

c Constructive Possession

1. Where one enters and occupies a tract of land under a deed having known and visible lines and boundaries, the law will ordinarily extend the force and effect of such possession to the outer boundaries of the deed, and where there is conflicting evidence as to the lines called for in the deed, the question of the amount of land occupied under presumptive possession under the deed is to be determined by the verdict of the jury as to the lines called for therein. *Ware v. Knight*, 251.

e Continuous Possession and Right to Tack Prior Possession of Another

1. Where a grantee of lots enters possession under a deed giving him the right of ingress and egress over other lands of the owner to terminate upon the opening of streets or alleys, he, taking in accordance with his conveyance may not tack the possession of a prior adverse possessor who did not take under these conditions, in claiming title by twenty years adverse possession. *Wallace v. Bellamy*, 759.

f Permissive Possession Under Deed or Lease

1. Where the grantee of lands enters possession of certain lots of land under a deed giving him the right of ingress and egress over other lands of the grantor until the happening of an event that will make such right unnecessary: *Held*, until the happening of that event only a permissive use of the land for the purposes stated is acquired by the grantee, and where he claims the right by adverse possession his possession will not be held to be adverse until he has done some open or overt act amounting to an assertion of the right by him adversely or until the event that was to terminate his easement under the deed has happened. *Wallace v. Bellamy*, 759.

AGENCY see Principal and Agent.

AGRICULTURE.

D Agricultural Liens.

b Crop Liens

1. The statutory landlord's lien, C. S., 2355, is superior to that of one furnishing supplies to the cropper, C. S., 2480, but where the cropper under a separate contract with the landlord raises a certain crop the lien for advancements attaches to such crop, and where the landlord has received the payment for the entire crop including the special crop under separate contract with the cropper and pays himself the amount due as rent, the lien for advancements attaches to the surplus and the holder of the lien may recover thereon from the landlord. *Glover v. Dail*, 659.

AIDERS AND ABETTORS see Criminal Law C b.

APPEAL AND ERROR (In criminal cases see Criminal Law L).

A Nature and Grounds of Appellate Jurisdiction of Supreme Court.

e Moot Questions

1. The principles of law involved in the question of the constitutionality of a statute imposing a license or privilege tax in their ultimate correct conclusion or application will be based upon the facts in each particular case, the Supreme Court will not decide hypothetical questions when not squarely presented for decision. *Express Agency v. Maxwell*, 637.

2. Where the question involved on appeal to the Supreme Court is the choice of a party of one of two candidates in its primary, after the general election has been held the question becomes abstract or academic and the appeal will be dismissed. *Rasberry v. Hicks*, 702.

C Requisites and Proceedings for Appeal.

a Filing and Service of Statement of Case on Appeal

1. Where upon the settlement of the case on appeal by the trial court a controversy arises between the parties as to whether the case was served within the time fixed, or allowed, or service within such time waived, the duty of the trial court is to find the facts, hear motions and enter appropriate orders thereon, and when it appears of record that the case was not served in time the trial court is without power to settle it, and his attempted settlement will be disregarded on appeal. *Smith v. Smith*, 463.

2. The allowance by the Supreme Court of a *certiorari* does not affect the time within which the case on appeal must be served, but where the appellant has not served his case in the time fixed or allowed, it does not warrant a dismissal, and the Supreme Court will review the record proper for error, and in the absence of error appearing upon its face, affirm the judgment appealed from. *Ibid.*

b Exceptions to Statement of Case on Appeal, Countercase and Settlement

1. Where the appellant prepares his statement of case on appeal and service thereof is accepted by the appellee within the time allowed by the judge, and is certified by the clerk as a part of the record,

APPEAL AND ERROR C b—*Continued.*

in the absence of service of exceptions or countercase it is deemed approved by the appellee, C. S., 643, and will stand in the Supreme Court as the case on appeal. *Texas Co. v. Fuel Co.*, 492.

2. It is appellant's duty, not that of the clerk of the trial court, to make out a complete statement of his case on appeal, and the latter is not required to fill in blank spaces left and referred to for copying in exhibits introduced upon the trial, etc., and when the clerk certifies up the case with the blanks left therein and to the correctness of the information contained in the pages afterwards supplied by some one, to which the appellee serves no exceptions or countercase, the record so sent up and the appellant's case becomes the case on appeal, and the judgment of the Superior Court will be confirmed if no error is made to appear either in the record proper or the "case" so certified. C. S., 643. *Carter v. Bryant*, 704.

c *Docketing Appeal*

1. Where the parties agree upon an extension of time for service of case on appeal that will not permit the docketing of the appeal in the Supreme Court in time to be heard according to the procedure in such instances, they knowingly put it beyond their power to comply with the mandatory provisions of Rule five of the procedure, and the case will be dismissed in the Supreme Court when these requirements have not been complied with by the appellant. *Pruitt v. Wood*, 788.

e *Certiorari*

1. Rule five of practice in the Supreme Court fixes the time in which appeals to the Supreme Court shall be docketed, and where the case is not docketed within the time prescribed the appellant, after docketing the record proper, should move for a *certiorari* upon the ground that the case could not be docketed in the time prescribed, but the granting of the writ is within the discretion of the court upon a proper showing and appellant is not entitled thereto as a matter of right. *Pruitt v. Wood*, 788.

f *Rules of Court Relating to Proceedings for Appeal in General*

1. The mandatory requirements of the rules regulating appeals to the Supreme Court may not be disregarded or set at naught either by an act of the Legislature, or by order of a Superior Court judge, or by consent of litigants or counsel, the uniform enforcement of the rules being necessary for the courts to properly perform their duties. This matter is fully discussed by STACY, C. J., giving a long line of unbroken decisions, and notice is given that hereafter cases not in conformance with the rules will be dismissed on the authority of this opinion without a discussion of their merits. *Pruitt v. Wood*, 788.

D Effect of Appeal.

a Powers of and Proceedings in Lower Court After Appeal

1. Where appellant has failed to docket the record on appeal and no writ of *certiorari* has been allowed in the Supreme Court, the court below may adjudge, upon proper notice, upon proof of such facts, that the appeal has been abandoned. *Pruitt v. Wood*, 788.

APPEAL AND ERROR—*Continued.*

E Record.

a Necessary Parts of Record Proper

1. The rules of practice in the Supreme Court require among other things that the pleadings, issues and judgment shall be a part of the record proper, and this appeal, the record not including the summons or complaint, and the Court, consequently not being informed as to the nature of the action, is dismissed. *Waters v. Waters*, 667.

2. Upon an appeal from the denying of a motion of change of venue only on one issue as to insanity, and the answer of the defendant giving rise to the motion not appearing of record and no brief of plaintiff filed, and it further appearing that the appeal is without merit, it will be dismissed. *Ellis v. Ellis*, 708.

b Matters not Appearing of Record Deemed Correct

1. Where the charge of the court is not set out in the record on appeal its correctness is presumed, and where the evidence, not excepted to, is sufficient to sustain the verdict, which is determinative of the rights of the parties, the judgment will be affirmed. *Williams v. Lumber Co.*, 774.

g Conclusiveness and Effect of Record

1. On appeal to the Supreme Court the record imports verity and the Court is not bound by what it contains. *Southerland v. Crump*, 111.

h Questions Presented for Review Upon Record

1. The liability of a surety or indemnitor is not presented on appeal when judgment in the lower court is not sought against him, and the question is not there presented by the pleadings or evidence. *Pearce-Young-Angel Co. v. Sternberg*, 21.

F Exceptions and Assignments of Error.

a Necessity of Exceptions and Assignments of Error

1. An exception without error assigned thereon will not be considered on appeal to the Supreme Court. Rule 28, 192 N. C., 853. *Pyatt v. R. R.*, 398.

I Rehearing.

b Law of the Case

1. Where on appeal in an action to redeem lands from a mortgage sale the Supreme Court holds that the heirs at law of a deceased mortgagor may not bring action to set aside the mortgage when at the time of the sale the estate of the mortgagor was insolvent, but states that there was no evidence that the power of sale had been improperly executed, and on subsequent appeal it is held that the former decision was the law of the case and precluded further inquiry: *Held*, upon a petition to rehear where the record discloses that the power of sale had not been properly executed, the doctrine of the law of the case will not preclude the court from determining the phase of the case not before the Court at the time the first decision was rendered when the rights of third persons have not intervened, the Court having the power to review its own decisions. *Jessup v. Nixon*, 122.

APPEAL AND ERROR—*Continued.*

J Review (Of award of Industrial Commission see Master and Servant F i; of contested elections see Elections I d).

a Of Interlocutory Orders and Injunctions

1. The Supreme Court on appeal in injunctive proceedings may review the evidence upon which the judge of the Superior Court found the facts upon which judgment was entered, but the burden is on the appellant to rebut the correctness of the facts so found by showing error upon assignments thereof. *Mewborn v. Kinston*, 72.

2. On appeal to the Supreme Court in injunctive proceedings the Court may examine the entire evidence and find the facts upon which it will act, and where in a suit to restrain the violation of a condition in a contract of employment, providing that the employee not engage in a similar business within a restricted area for a definite time after the termination of the employment, the trial court fails to find specifically as to whether the employee voluntarily left the employment, it will be presumed that the court found that the employee did voluntarily leave the employment as the evidence tended to show, or that such a finding was immaterial, and a judgment of the Superior Court reversing a correct judgment of a municipal court upon sustaining findings and conclusions of law will be reversed. *Moskin Bros. v. Swartzberg*, 539.

c Of Findings of Fact (Remand for indefinite findings see hereunder K a)

1. Under a compulsory reference the findings of fact by the referee upon supporting evidence and approved by the trial court are binding upon appeal to the Supreme Court, a jury trial not being demanded or the right thereto not being preserved. *Martin v. Bush*, 93; *McDonald v. Lingle*, 219; *Wood v. Bank*, 371.

d Burden of Showing Error and Presumption of Correctness of Judgment of Lower Court

1. The correctness of an instruction not appearing of record is presumed on appeal. *Rogers v. Ray*, 577.

e Harmless Error

1. Exceptions to the trial court's ruling upon the admission of evidence will not be sustained when the evidence is of little probative value and the error, if any, is harmless; nor will a new trial be awarded for error in the court's charge when the alleged error, if any, does not prejudice the appellant. *Thurston v. R. R.*, 496.

2. In an action on a bond for the construction of a public school given as required by C. S., 2445, the surety is entitled to recover the actual loss sustained by him by reason of the failure of the county board of education to retain the required percentage from the amount actually used by the contractor to pay laborers and materialmen, *Crouse v. Stanley, ante*, 186, but where it is found as a fact by the referee and approved by the trial court that the required percentage was retained, and that the contractor had paid out more than the contract price, the refusal of special instructions requested by the surety that payment by the contractor for materials would not be presumed, is harmless. *Supply Co. v. Board of Education*, 575.

APPEAL AND ERROR J e—*Continued.*

3. Where issues submitted to the jury are not in accordance with the theory upon which the case was tried, but the result of the trial agrees with the theory and involves only a question of fact, the case will not be remanded for another hearing. *Lilly v. Smith*, 809.

g Question Necessary to Disposition of Cause

1. Where an action has been correctly determined in favor of the defendant on the theory of trespass, the question of the plaintiff's right to injunctive relief is immaterial. *Knight v. Lewark*, 407.

K Determination and Disposition of Cause.

a Remand for Necessary Parties, Findings or Preliminary Proceedings

1. Where in an action to recover the statutory penalty for usury the two-year statute of limitation is pleaded in bar of recovery, and the case is referred to a referee, the defendant is entitled to a specific finding of fact in regard to the date of the transactions so that the law in regard to the plea of the statute can be applied to the facts, and where the findings of fact are not sufficiently definite on this point the case will be remanded for additional facts, which in this case may be found by the trial court without the necessity of another reference. *McNeill v. Suggs*, 477.

2. The Supreme Court will take judicial notice on appeal of the lack of administration of an estate, necessary to the determination of the case, and where the record discloses such deficiency the judgment will be remanded in order that the defect be remedied. *In re Peaden*, 486.

3. Where on appeal there is no agreed statement of fact or finding as to whether a deceased clerk of court invested and received interest, for which his estate must account, on a sum paid into his hands under the provisions of C. S., 148, the case will be remanded for a specific finding in regard thereto. *Williams v. Hooks*, 489.

4. Where a judgment by default has been entered against a defendant by the clerk for the want of an answer, and thereafter the defendant has died and his administrator moves the court to set it aside on the ground that the sheriff's return of service was not in truth and fact correct, and that the summons had not been served, and offers sufficient evidence to sustain his motion, it is the duty of the Superior Court judge hearing and determining the matter to set out in his judgment denying the motion his findings of fact with his conclusions of law, and on appeal the case will be remanded when he has failed to do so. *Jordan v. McKenzie*, 750.

L Proceedings in Lower Court After Remand.

a Matters and Questions Open for Further Proceedings

1. Where the plaintiff brings suit to enjoin the defendant from foreclosing upon a mortgage or deed of trust, and the defendant sets up as a counterclaim the notes secured by the mortgage, and the temporary order is continued to the final hearing upon the plaintiff's filing bond, and upon the trial of the action the defendant's motion as of nonsuit is allowed and the judgment affirmed on appeal, defendant's motion for judgment on the counterclaim, made

APPEAL AND ERROR L a—*Continued.*

for the first time after the final judgment, and while the action was pending only for the purpose of ascertaining the damages which the defendant had sustained by reason of the issuance of the restraining orders, is properly refused, the defendant by moving for judgment as of nonsuit and by failing at that time to move for judgment on his counterclaim having waived his right, if any, to such judgment, his motion as of nonsuit operating in effect as a voluntary nonsuit on the counterclaim. *Gruber v. Eubanks*, 335.

ARMY—War risk insurance see Insurance N a.

ASSAULT—With intent to kill see Homicide D.

ASSIGNMENTS.

C Rights and Liabilities of Parties.

a Upon Unconditional Acceptance of Assignment

1. Where the subcontractor for the construction of a highway assigns all payments that become due to him from the contractor to a bank as security for loans, and the contractor unconditionally accepts the assignment: *Held*, the contractor by his unconditional acceptance of the assignment is liable to the assignee bank to the extent of all moneys in his hands due the subcontractor, to the extent of the subcontractor's debt to the bank, and upon the subcontractor's abandonment of the work and its completion by the contractor at a loss the contractor may not deduct the amount expended by him to complete the contract, the rights of the parties being determined by the written agreements, and equities between the parties having no application. Acceptances upon condition of the completion of the work distinguished by BROGDEN, J. *Bank v. McCanless*, 360.

ATTORNEY AND CLIENT (Attorney's neglect not imputed to client see Judgments K b 1).

D Compensation and Lien of Attorney.

a Fees

1. Where an attorney is employed to institute an action, and the action has been instituted and successfully prosecuted, and the attorney has fully discharged all duties he was employed to perform, he is entitled to recover his fee therefor. *Hamme v. Lineberger*, 342.

AUTOMOBILES—Negligent driving of see Highways B; mechanics' liens see Mechanics' Liens.

"BAD CHECK LAW" see Bills and Notes I f.

BANKS AND BANKING.

H Insolvency and Liquidation.

a Statutory Liability of Stockholders Upon Insolvency

1. Where a State bank transfers all its assets to another State bank which assumes the former's liabilities, effecting a consolidation under the provisions of C. S., 217(k), and the transferee bank later becomes insolvent, and is taken over by the Corporation Commission as liquidating agent, the right to assess the stockholders of the transferer bank on their statutory liability to cover the deficiency in

BANKS AND BANKING H a—*Continued.*

its assets to pay its liabilities, for which it was liable to the transferee bank under the agreement of consolidation, is barred when the proceedings for the assessment are instituted more than three years after the transfer. In the instant case, C. S., 240, is not applicable, no receiver having been appointed for the transferer bank, and the transfer being made before the enactment of chapter 113, Public Laws of 1927. *Corp. Com. v. Stockholders*, 586.

2. Under the provisions of our statute, section 15, chapter 4, Public Laws of 1921 as amended by chapter 47, Public Laws of 1927, and chapter 73, Public Laws of 1929, either a state or national bank may purchase the assets of another bank, including the statutory liability of the stockholders of the selling bank, upon such terms as are agreed upon and approved by the Corporation Commission, and suit on the statutory liability of the stockholders of the selling bank may be instituted in the name of the purchasing bank to the use of the selling bank within three years from the date of the transfer, and chapter 113, Public Laws of 1927, now C. S., 218(c) does not repeal chapter 15, Public Laws of 1921, as amended, and is inapplicable when the liquidation is under the provisions of that act, and the amendment of the act of 1921 by chapter 73, Public Laws of 1929, being only to correct a typographical error, does not affect the right of action accruing prior to its enactment, it being significant only as legislative construction that the act of 1921 was not repealed by the act of 1927. *Trust Co. v. Roscower*, 653.

b Right of Action Against Officers for Wrongful Depletion of Assets

1. The officers and directors of a bank are trustees or *quasi*-trustees in respect to the performance of their official duties and are liable for either wilful or negligent failure to perform them, but a particular stockholder may not maintain an independent action against them for such negligent failure to recover for the loss of value of his stock, without allegation and proof that he has sustained a loss peculiar to himself, or allegation of demand upon the receiver to bring the action and his refusal to do so, and a demurrer to the action of such particular stockholder is properly sustained and the action dismissed. *Roscower v. Bizzell*, 656.

J Merger and Consolidation of Banks.

a Control and Approval of Corporation Commission

1. Where under the provisions of C. S., 217(k), a State bank under jurisdiction of the Corporation Commission has transferred its assets to another State bank, the latter assuming the former's liabilities under a consolidation agreement, it will be presumed that the Corporation Commission had notice or knowledge of the transaction coming within the scope of its duties, and had approved of the transaction as the statute requires. *Corp. Com. v. Stockholders*, 586.

BASTARDS.

C Legitimating Bastards.

a Procedure

1. The requirements of C. S., 277 (Revisal, 263), as to the procedure and jurisdiction of legitimating children by their father, is that

BASTARDS C a—*Continued.*

"the putative father of any illegitimate child may apply by petition in writing to the Superior Court of the county in which he resides . . . and if it appears that the petitioner is reputed the father of the child, the court may thereupon declare and pronounce the child legitimated; and the clerk shall record the decree," and *Held*, the action of the judge of the court having jurisdiction in passing upon the matter is within the intent and meaning of the statute, and his decree is not void upon the ground that the petition should have been originally addressed to the clerk of the court. *Dunn v. Dunn*, 535.

BILLS AND NOTES.

A Requisites and Validity (Wife's power to execute see Husband and Wife B e 1).

a Consideration

1. It is prima facie presumed that a negotiable instrument is supported by valuable consideration, C. S., 3004, and that all signers thereof are parties and liable thereon; partial failure of consideration is a defense *pro tanto* whether in an ascertained or unliquidated amount. C. S., 3008. *Taft v. Covington*, 51.

2. Where a husband and wife execute a purchase-money negotiable note for lands conveyed to him and secured by a mortgage, and suit against them is brought on the note, the *feme covert* may not set up the defense of want of consideration moving to her or give evidence to that effect in contradiction of the negotiable instrument she has signed with her husband, her remedy being by suit to reform the instrument for mutual mistake or mistake induced by fraud in order for the defense that she signed the note merely to convey her dower right to be available to her. *Ibid.*

B Negotiability and Transfer.

b Transfer by Endorsement

1. Where the maker of a promissory note arranges with a bank to take up the note, the endorsement from the payee is some evidence of a transfer of the note, which, taken with other evidence in this case, is sufficient to be submitted to the jury on the question of its bargain and sale. *Bank v. Trust Co.*, 582.

D Construction and Operation.

b Liability of Parties on Note

1. One signing a negotiable instrument as an accommodation party, having received no value, is bound to the payment thereof to a holder for value in due course though taking with notice, C. S., 3009, and a maker of the instrument engages that he will pay it in accordance with its tenor, and admits the existence of the payee and his capacity to endorse. C. S., 3041. *Taft v. Covington*, 51.

2. When a promissory note sued on has the signatures of two of the defendants on its face as joint makers and the other defendant's signature on the back as endorser, the statute makes them each liable to the payee, C. S., 3044, 2977, and nothing else appearing.

BILLS AND NOTES D b—*Continued.*

those signing as makers are primarily liable, with the right of contribution among themselves, while the endorser is secondarily liable. *Trust Co. v. York*, 625.

3. As between themselves, those whose names appear upon a promissory note as makers and endorsers may show by parol agreement that their respective liability was different than that fixed by statute in the placing of their signatures upon the instrument in suit, and where the correctness of the note as to the placing of the signatures is admitted, the burden of proof is upon the defendant claiming it, to show by parol that his liability was different from that which the statute imports. *Ibid.*

4. One who places his name upon the back of a negotiable note without specifying therein that he is otherwise to be bound thereon, is secondarily liable to those whose names thereon appear as makers, and nothing else appearing, may recover from them upon payment of the note. *Ibid.*

II Actions on Notes.

a Burden of Proof

1. In an action on a note the burden of proving lack of consideration therefor is on the defendant, the execution of the note having been established, and where in an action on a note the plaintiff introduces the note signed by a husband and wife given for the purchase price of a tract of land sold to the husband, the wife is not entitled to a directed verdict on the plaintiff's evidence on the theory that she signed the note only in order to convey her dower right in the land, she having introduced no evidence. *Taft v. Covington*, 51.

2. Where the negotiable instrument sued on has the names of two of the defendants appearing as makers and the other as endorser, and the evidence is conflicting as to whether the one appearing thereon as endorser was in fact an endorser, or an accommodation endorser or primarily liable as a joint maker, he is prima facie liable as an endorser, but may, as between the parties, establish his liability as an accommodation endorser, with the burden of proof on him to show it, and the burden on the other defendants to show his liability was a primary one as joint maker, when they so contend, and an instruction which fails to correctly charge the jury as to these presumptions will be held reversible error as to the endorser, and a new trial will be granted him on his appeal. *Trust Co. v. York*, 624.

I Checks and Drafts.

f Criminal Responsibility for Issuing Worthless Check (Variance between charge of obtaining goods by means of worthless check and proof of violation of "Bad Check Law" see Indictment E c 2).

1. Our "bad check law" is a criminal statute and must be strictly construed, and in order for a drawer or maker of a check to be convicted thereunder it is necessary that he have knowledge at the time of drawing the check that he did not have sufficient funds and had not arranged with the drawee bank for its payment upon presentation. *S. v. Baker*, 578.

BILLS AND NOTES I f—*Continued.*

2. Where, in a prosecution under our bad check law, the evidence tends to show that the defendant was a fish dealer and had arranged with another to buy for him as his agent, and had furnished him a blank check book and authorized him to draw checks on his account signed in his name by the other as agent, and that the agent drew a check in payment of oysters as authorized and that the check was returned marked "insufficient funds," and there is no evidence that at the time the check was drawn the principal had knowledge of the drawing of the check or the amount thereof: *Held*, the evidence is insufficient to show knowledge required for conviction under the statute, and judgment as of nonsuit should have been entered. C. S., 4643. *Ibid.*

BILL OF PARTICULARS see Pleadings F a.

BIRTH—Proof of date of, see Evidence G c.

"BLUE SKY LAW" see Corporations D f.

BOUNDARIES see Deeds and Conveyances D.

BROKERS—Contract for payment of sum upon sale of land see Contracts B d 1.

BURGLARY.

C Prosecution and Punishment.

f Instructions

1. Where in a prosecution for burglary all the evidence tends to show occupancy of the house at the time of the breaking and entering, an instruction that the jury might convict the defendant of burglary in the second degree would be erroneous, although a verdict of guilty of burglary in the second degree would stand, but where the evidence would sustain a verdict of burglary in the first degree, or of breaking and entering otherwise than burglariously with intent to commit rape or other infamous crime, or of an attempt to commit either offense, or not guilty, the defendant is entitled to have the different views arising upon the evidence presented to the jury, and an instruction that the jury might convict the defendant of burglary in the first degree or acquit him is error which is not cured by a verdict of guilty of burglary in the first degree, and a new trial will be awarded. C. S., 4640. *S. v. Ratcliff*, 9.

CANCELLATION OF INSTRUMENTS.

A Right of Action and Defenses.

a Right to Cancellation and Rescission in General

1. The failure of the seller of land in a development to perform his promissory representations as to improvements to be made therein is not sufficient ground for equity to afford the remedy of cancellation and rescission where the representations are made in good faith with the present intent to perform, the remedy of the purchaser being, in proper instances, an action at law for damages for condition broken. *Hinsdale v. Phillips*, 563.

CANCELLATION A—*Continued.*

b For Fraud

1. In order for equity to afford the relief of cancellation and rescission for the failure of a seller of land in a development to perform his promissory representations as to improvements to be made therein, the representations must be made without the present intent of the promisor to perform, and must deceive and be relied on by the promisee and materially induce him to enter into the contract to his damage. *Hinsdale v. Phillips*, 563.

2. Where, in a suit to rescind a deed and cancel notes given for the purchase price for the failure of the seller of land in a development to perform his promissory representations as to improvements to be made therein, there is evidence that the seller put a large number of men to work upon the improvements and spent large sums of money thereon, and all the evidence tends to show that the representations were honestly made with the present intent to perform, the defendant's motion as of nonsuit should be allowed. *Ibid.*

c Mutual Mistake

1. Where a real estate agent makes misrepresentations as to the character of construction of a house he is offering for sale without knowledge of their falsity, of which the purchaser is also ignorant, under proper pleadings for this relief the consummated transaction may be rescinded for the mutual mistake of the parties, and where it appears from the issues and instructions that the verdict was rendered upon the theory that the remedy sought was to recover damages for fraud and deceit, which under the facts of the case were not recoverable, a new trial will be awarded on appeal. *Ebbs v. Trust Co.*, 242.

B Proceedings and Relief.

a Jurisdiction

1. The Superior Court has jurisdiction over a suit to cancel a deed or mortgage and to administer equities therein involved. *Hinsdale v. Phillips*, 563.

c Laches

1. Where the owner of a development sells certain lots therein and represents that certain improvements would be made in the development within a year, and a purchaser of some of the lots takes possession of the lots conveyed, occupying as a home a house on one of the lots, for a period of over two years, and enters into a trust agreement for the completion of the improvements by a trustee, and large amounts of money are expended by the original seller and the trustee in making improvements therein, and the purchaser brings suit for cancellation and rescission three years after the execution of the deed: *Held*, his equitable right, if any, to rescission of the deed and cancellation of the notes given for the purchase price, for that the representations in regard to the proposed improvements were false and fraudulent, is barred by his acceptance of benefits accruing to him from the contracts, and his delay in demanding a rescission of the deed, and the defendant's motion as of nonsuit should have been allowed. *Hinsdale v. Phillips*, 563.

CARRIERS (Liability of street railway for injury to pedestrians and passengers see Street Railways; liability of railroad for injury to persons on track see Railroads D c; for injury in accidents at crossings see Railroads D b; for injuries to employees see Master and Servant E).

B Carriage of Goods.

a Shipping Facilities, Notice of Required Service, Delivery and Loading

1. An agreement by a transportation company to furnish sufficient shipping facilities at a certain place for the shipment of a crop of watermelons to be raised by the shipper, the agreement being made before the crop was planted and in contemplation of favorable weather conditions, is too indefinite and uncertain to be a valid and enforceable contract, and the alleged contract, tending to create a special advantage to a particular shipper, would also be invalid for that reason. *McLemore v. R. R.*, 264.

2. Where the shipper of a crop of watermelons in interstate commerce brings action against the carrier for failure to provide sufficient and accessible cars and reasonably adequate loading facilities for transporting part of the crop to the market, resulting in the loss thereof: *Held*, the carrier having filed its tariff on goods to be transported with the Interstate Commerce Commission, the failure of the shipper to give the written request, required by the rule constituting a part of the tariff, as to the type and character of the service desired, will prevent his recovery in the action, and although reasonable accessibility of cars furnished is contemplated in the term "transportation," as defined by the Federal Transportation Act, the machinery of the act is put into operation by the giving of the written request for such service required by the rule. *Ibid.*

CEMETERIES.

A Suits to Enjoin Use of Land for Cemetery.

a Grounds Therefor; Nuisance, Public Health

1. The facts found by the trial judge in his order, supported by evidence, restraining the use of lands for a cemetery for the reason of injury to health of those living near and of special injury to the plaintiff are conclusive upon the Supreme Court on appeal, and the order will be sustained in equity on the ground that the law cannot afford an adequate remedy in awarding damages. *Surratt v. Dennis*, 757.

CHAIN STORE TAX see Taxation A c 1, 2, 3.

CHATTEL MORTGAGES (Rights of mortgagee upon seizure of mortgaged chattel see Intoxicating Liquor F a 1).

B Lien and Priority (Subjection of property sold under chattel mortgage to lien of real mortgage upon annexation to building see Mortgages C a 1; superiority of mechanics' lien to chattel mortgage see Mechanics' Liens A b 2).

d Preservation and Waiver of Lien

1. Upon the question in this case as to whether the lien under a prior conditional sales contract had been lost by the taking of a subsequent chattel mortgage, the evidence was of sufficient probative force to take the case to the jury, and the refusal of an instruction directing a verdict was proper. *Rogers v. Ray*. 577.

CHECKS—Issuing worthless see Bills and Notes I f.

CERTIORARI see Appeal and Error C e.

CITIES AND TOWNS see Municipal Corporations.

CLASSIFICATION—Of property for taxation see Taxation A c.

CLERKS OF COURT.

B Duties and Liabilities.

a Receiving, Management and Payment of Moneys Paid into Their Hands

1. Where funds belonging to a minor are paid into the hands of the clerk of the Superior Court by an administrator under the provisions of C. S., 148, discharging the administrator and his sureties from liability in regard thereto, it is not required by statute, C. S., 153, 956, that the clerk invest the funds, upon interest, unless so directed, the clerk being liable for such funds as an insurer, and the clerk and his sureties are not liable for the amount of interest the funds would have drawn if they had been so invested, but if the funds are actually invested by the clerk he is liable for the interest actually received therefrom, since a fiduciary will not be allowed to make a personal profit out of funds committed to his custody. *Williams v. Hooks*, 489.

COLLEGES—Junior municipal see Schools and School Districts E c.

COMMERCE see Carriers; taxation on interstate see Taxation A h.

CONCEALED WEAPONS.

A Elements of Offense of Carrying Concealed Weapon.

a Intent to Conceal

1. The knowledge of the defendant that he was carrying a concealed weapon is equivalent under the statute to criminal intent to conceal required by law for conviction, and an instruction that if the jury should find from the evidence that the defendant carried the pistol off his own premises knowing it to be concealed he would be guilty, otherwise not guilty, is not error. *S. v. Sauls*, 193.

B Trial.

a Evidence and Nonsuit

1. Evidence that the defendant was arrested on the premises of another and had on his person when arriving at the jail a pistol belted to him and covered by a sweater he was wearing, and that the officers arresting him saw no weapon on him at the time of the arrest, is sufficient to take the case to the jury upon the question of his guilt of carrying a concealed weapon in violation of the statute over the defendant's contention and testimony that the weapon was not concealed, the issue being for the determination of the jury. *S. v. Sauls*, 193.

b Instructions

1. Where a defendant is tried for the statutory offense of carrying a concealed weapon off his own premises, and there is evidence permitting the inference that it was not concealed at or before the time of his arrest, and that later it was concealed by accident, an

CONCEALED WEAPONS B b—*Continued.*

instruction, which in effect charges the jury that the defendant would be guilty if the weapon was not concealed at the time of the arrest, and was thereafter concealed by accident, is reversible error. *S. v. Sauls*, 193.

CONSOLIDATED STATUTES (for convenience in annotating).

SEC.

76. Mortgage given by devisee on lands devised is not absolutely void. *Bank v. Zollicoffer*, 620.

93. Law implies promise to pay funeral expenses and makes them preferred claim against estate. *Brown v. Brown*, 473.

137 (2). In this case *held:* father of deceased child was entitled to inherit from child under canons of descent. *In re Peaden*, 486.

153, 956. Clerk is not required to invest funds paid into his hands under C. S., 148. *Williams v. Hooks*, 489.

159, 162, 461, 462. Action for negligent injury not causing death survives to personal representative of injured person. *Fuquay v. R. R.*, 500.

217(k). It will be presumed that Corporation Commission approved of consolidation of banks. *Corporation Commission v. Stockholders*, 586.

218(c). Statutory liability of stockholders held enforceable by bank purchasing assets of another bank. *Trust Co. v. Roscower*, 653.

277. Petition for legitimating bastards may be addressed directly to Superior Court judge. *Dunn v. Dunn*, 535.

415. Where record contains no evidence of payment of costs of prior action a directed verdict for plaintiff will be held for error. *Southerland v. Crump*, 111. Where allegations are not substantially identical judgment of nonsuit is not a bar. *Ingle v. Green*, 149.

Nonsuit in action against railroad under Federal Employers' Liability Act does not bar subsequent action under C. S., 3466, 3467. *Fuquay v. R. R.*, 500.

442. Statute must be pleaded when relied on as defense to action for usury. *McNeill v. Suggs*, 477.

451. After party has been discharged under C. S., 6214 court may not appoint a guardian for him. *Orr v. Beachboard*, 276.

456, 460. All parties necessary to final judgment may be brought in by order of court. *Mack Truck Corp. v. Trust Co.*, 203.

523. Burden of proving contributory negligence is on defendant and is ordinarily a question for jury. *Butner v. R. R.*, 695.

535. Where pleadings liberally construed allege cause of action demurrer is properly overruled. *Smithwick v. Pine Co.*, 431.

564. Instruction in this case held sufficiently full. *Teasley v. Burwell*, 18. Where question of proximate cause is material failure to instruct thereon is error. *Moss v. Brown*, 189.

In this case held: court did not express opinion as to weight of evidence. *S. v. Jackson*, 321; *Keller v. Furniture Co.*, 414.

CONSOLIDATED STATUTES—*Continued.*

SEC.

567. Where motion to nonsuit is not made at close of plaintiff's evidence, denial of motion made at close of all evidence is not appealable. *Penland v. Hospital,* 314. Motion must be renewed at close of all evidence to present question on appeal. *Lane v. Paschall,* 364.

643. Certified statement of case on appeal will stand when appellee fails to serve countercase or exceptions. *Texas Co. v. Fuel Co.,* 492; *Carter v. Bryant,* 704.

854. Measure of damages recoverable on injunction bond. *Gruber v. Eubanks,* 335.

888. Remaindermen must have good vested title in order to bring action for waste. *Batten v. Corp. Com.,* 460.

978 (4). Violation of court order must be wilful in order to constitute contempt. *West v. West,* 12.

996. (As amended by Public Laws of 1929.) Wife's deed in marriage settlement in this case held to create voluntary trust. *MacRae v. Trust Co.,* 714.

1137. Service on Secretary of State is void where foreign corporation is not doing business here. *White v. Lumber Co.,* 410.

1610. Debtor whose assets exceed his liabilities is not insolvent. *Flowers v. Chemical Co.,* 456.

1734, 1739. Deed in this case held to convey fee tail special converted into fee by statute. *Paul v. Paul,* 522.

1744. Life tenant may have estate sold for reinvestment under this section. *Smith v. Suitt,* 5.

1810. Notice to guardian *ad litem* appointed without authority after party had been discharged under C. S., 6214, is not sufficient for taking of deposition. *Orr v. Beachboard,* 276.

2079, 2086. Held modified to extent that county game commissions are made subordinates to State Game Commission. *S. v. Sizemore,* 687.

2144. Where evidence supports finding that contract set up in complaint was void under section a judgment in favor of defendant will be affirmed, the burden being on plaintiff to prove contract valid. *Martin v. Bush,* 93.

2306. Usury is knowingly taking or receiving more than six per cent interest. *McNeill v. Suggs,* 477.

2355, 2480. Holder of crop lien held entitled to surplus from crop grown under contract with landlord after payment of landlord's lien. *Glover v. Dail,* 659.

2435. Where possession of property from mechanic is obtained by fraud his lien thereon is not destroyed. *Reich v. Triplett,* 678.

2438. Materialman's lien attaches against owner where owner, after notice, pays contractor more than amount of notice. *Hardware Co. v. Burtner,* 743.

2445. Surety is entitled to recover actual loss resulting from failure to retain percentage. *Supply Co. v. Board of Education,* 575.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2470. Whether notice of claim of lien was filed within time held question for jury, C. S., 2444, not applying. *Supply Co. v. McCurry*, 799.

2507, 2515. Married woman may execute certain executory contracts and is liable on note signed by her. *Taft v. Covington*, 51.

2515. Deed of wife not probated in accordance with statute is void and will not operate as an estoppel. *Capps v. Massey*, 196.

2530. Where husband has abandoned wife she may convey her property without his consent under the statute, and C. S., 2509 does not apply. *Keys v. Tuten*, 368.

2563, 2574. Plaintiff must show causal relation between violation of 2563 and injury in order to recover under 2574. *Lewis v. Archbell*, 205.

2591. Statutory powers of clerk in regard to resale are to be strictly construed. *Redfern v. Roberts*, 128.

2673, 2787. Ordinances regulating filling stations held within police power of city. *Wake Forest v. Medlin*, 83.

2703, 2713. Ownership of street is prerequisite to power of city to levy street assessments. *Efird v. Winston-Salem*, 33.

2713, 2716. General statute of limitations does not apply to street assessments under city charter in this case. *Statesville v. Jenkins*, 159.

2792. City may condemn land for street and levy assessments for improvements in one action. *Efird v. Winston-Salem*, 33.

2969(s). Where clerk erroneously places sum in sinking fund the city may correct error. *Mewborn v. Kinston*, 72.

2977, 3008, 3041. Married woman signing note as accommodation endorser is liable to holder in due course. *Taft v. Covington*, 51.

3044, 2977. Liability of parties to note as against payee is determined by position of signatures. *Trust Co. v. York*, 624.

3255. Life tenant may not have estate sold for partition of proceeds in adversary proceedings. *Smith v. Suitt*, 5.

3311. Prior registered mortgage is first lien on land as against mortgages or equities not appearing of record. *Duncan v. Gulley*, 552; *Story v. Slade*, 596; *Lawson v. Key*, 664.

3411(f). Lien of innocent lienor attaches to proceeds of forfeiture sale of car, but he is not entitled to possession thereof. *C. I. T. Corp. v. Burgess*, 23.

3846(v). Surety contract should be liberally construed, and bond held liable for materials furnished subcontractor. *Overman v. Indemnity Co.*, 736.

3924(ff). Agreement in this case held not to be within intent of statute. *S. v. Heath*, 135.

3930, 324. Sheriff's bond is not liable for injury caused by prisoner while he is unlawfully at large as trustee. *Sutton v. Williams*, 546.

CONSOLIDATED STATUTES—*Continued.*

SEC.

3944, 4393. Sheriff is liable for escape of prisoner through negligence or malfeasance of himself or jailer, and escape is effected when sheriff without authority allows prisoner to go at large as trusty. *Sutton v. Williams*, 546.

4171, 4173. Criminal conspiracy is felony under the statutes and Superior Courts have exclusive original jurisdiction of prosecutions therefor. *S. v. Ritter*, 117.

4214. Evidence of assault with intent to kill in violation of the statute held sufficient; elements of the offense. *S. v. Hefner*, 778.

4277. Under facts of this case conviction of defendant under statute was error. *S. v. Corey*, 209.

4283, 4643. Offense of issuing worthless check and violation of C. S., 4283 are not identical and charge of violation of one and proof of violation of the other is fatal variance. *S. v. Martin*, 636. Indictment under the statute must charge an intent to defraud or deceive. *S. v. Horton*, 771.

4317. "Pasture" and "cultivated field" as used in statute are not synonymous. *S. v. Cornett*, 634.

4613. Bill of particulars is not subject to demurrer. *S. v. Beal*, 279.

4622. Court has power to consolidate action, and upon general verdict of guilty, to enter judgment on each offense. *S. v. Harvell*, 599.

4639, 4640. Court should have instructed jury that they might convict of lesser degree of the crime. *S. v. Ratcliff*, 9. In this case failure to instruct jury that they might convict of lesser degree of crime was not error. *S. v. Jackson*, 321.

4643. Evidence on motion is to be taken in light favorable to State. *S. v. Beal*, 278. Evidence of defendant's guilt of possession of intoxicating liquor held insufficient. *S. v. Johnson*, 429. Evidence in this case held insufficient to go to jury as to principal's liability for worthless check given by agent. *S. v. Baker*, 578. Reversal of judgment of guilty has effect of verdict of not guilty. *S. v. Corey*, 209.

4651. Where affidavit for leave to appeal in *forma pauperis* does not state that appeal is in good faith questionable whether Supreme Court acquires jurisdiction. *S. v. Bynum*, 376.

4659. Judgment in capital case must be written and signed by judge. *S. v. Jackson*, 321.

5410, 5419. Acts of appointees of school board held not subject to annulment by proceedings in instant case. *Crabtree v. Board of Education*, 645.

5429, 5585, 5586, 5595, 5601, 5603, 5608. Determination of number of teachers is judicial or *quasi*-judicial function of board of education. *Wilkinson v. Board of Education*, 669.

5443. If additional tax is necessary to operation of kindergarten schools in city vote of people is necessary. *Posey v. Board of Education*, 306.

CONSOLIDATED STATUTES—*Continued.*

SEC.

5470. School board held authorized to sell property involved in this case. *Tucker v. Smith*, 502.

6214. After party is released under statute court has not authority to appoint guardian *ad litem* for him. *Orr v. Beachboard*, 276.

6460. Statute not applicable to insurance policy in this case. *Gilmore v. Ins. Co.*, 632.

7979(a). Does not apply to action to recover tax alleged to have been illegally assessed. *Bunn v. Maxwell*, 557.

CONSPIRACY.

B Criminal Conspiracy.

b Evidence of Criminal Conspiracy (Admissibility of acts and declarations of coconspirators see Criminal Law G k)

1. Evidence in this case is held sufficient of a conspiracy to kill. (See *S. c.*, 197 N. C., 113.) *S. v. Ritter*, 116; *S. v. Beal*, 278.

CONSTITUTION (for convenience in annotating).

ART.

I, sec. 17. C. S., 3411(f) transferring the lien upon automobiles seized and sold for unlawful transportation of intoxicants to the proceeds of the sale does not deprive the lienor of property rights guaranteed by section. *C. I. T. Corp. v. Burgess*, 23.

II, sec. 14. Where original act incorporating town is passed in conformity with section it is not required that act enlarging boundaries be so passed. *Penland v. Bryson City*, 140.

II, sec. 30. Where clerk erroneously places fund in sinking fund the city may correct the error. *Mewborn v. Kinston*, 72.

IV, sec. 8. Supreme Court confined to matters of law or legal inference on appeal. *S. v. Lawrence*, 481.

IV, secs. 10, 11. Special judge appointed to hold single term may not hear motion returnable to district. *Reid v. Reid*, 740.

V, sec. 3. Applies by inherent justice to taxation on trades, professions, franchises, and incomes. *Tea Co. v. Maxwell*, 433. Minimum tax on express companies of $15.00 per mile held constitutional. *Express Agency v. Maxwell*, 637.

V, sec. 9. Supreme Court will not pass upon claim against State where no question of law is involved. *Warren v. State*, 211.

IX, sec. 2. Legislature has constitutional power to require city to operate kindergarten schools. *Posey v. Board of Education*, 306.

IX, sec. 3. It is legislative function to formulate the means of providing six months school term. *Wilkinson v. Board of Education*, 669.

X, sec. 6. Where consent of husband is not obtained conveyance of wife is void and does not operate as estoppel. *Capps v. Massey*, 196; but where husband has abandoned wife she may convey without his consent. *Keys v. Tuten*, 368.

CONSTITUTIONAL LAW (Police power see Municipal Corporations H; constitutional requirements in enactment of statutes see Statutes A a; right to fair trial see Criminal Law I c; taxation on interstate commerce see Taxation A h; equal protection clause does not prohibit classification for taxation see Taxation A c 3; legislative power to require city to operate kindergarten schools see Schools and School Districts E b 1).

E Obligations of Contract.

b Means and Remedies for Enforcement of Contract

1. Ordinarily, the obligation of a contract is coeval with the undertaking to perform, and includes all the means which, at the time of its making, the law afforded for its enforcement, and where a city annexes an entire incorporated town and assumes its outstanding indebtedness, the property of the residents of the town may not be relieved of taxation for that year without lessening the means provided by law for the enforcement of the engagements of the town. *Green v. Asheville*, 416.

CONTEMPT.

A Acts or Conduct Constituting Contempt of Court.

a In General

1. C. S., 978, defining contempt of court for which a defendant may be punished should be strictly construed as a criminal statute. *West v. West*, 12.

b Disobedience of Order of Court

1. It is required by the express terms of the statute that in order to punish one as in contempt of court, C. S., 978, subsection 4, that he should have wilfully disobeyed a process or order lawfully issued by a court, and where the husband, in proceedings against him for contempt for disobeying an order to pay moneys for the support of his child, shows by the uncontradicted testimony of himself and witness that he had no property nor income except what he could earn, and that he had been unable to obtain employment and was therefore unable to comply with the terms of the order, the evidence fails to show that the disobedience was wilful, and he may not be adjudged in contempt of court and a sentence imposed upon him. *West v. West*, 12.

B Power to Punish and Proceedings Therefor.

b Findings of Facts

1. Upon imposing a sentence for contempt of court the judge should find the fact concerning the purpose and object of the contemnor sufficient to support his judgment. *West v. West*, 12.

CONTRACTS (Usurious contracts see Usury; insurance contracts see Insurance; surety contracts see Principal and Surety; contracts to furnish shipping facilities see Carriers B a 1, 2; impairment of obligations of see Constitutional Law E; enforcement of by injunction see Injunctions B c; assignment of see Assignments; cancellation of see Cancellation and Rescission of Istruments; contracts enforceable against receiver of insolvent corporation see Corporations H a 1).

A Requisites and Validity.

f Contracts in Restraint of Trade or Business

1. The statute, C. S., 2563, condemns a contract of sale only when such sale is made "upon the condition" that the purchaser shall not

CONTRACTS A f—*Continued.*

deal in the goods or merchandise of a competitor of the seller, and in order for a party to recover damages for a breach of the statute under the provisions of C. S., 2574, he must show a violation of the statute and a causal relation between the violation and injury to his business, and *held:* in this case, the cause should be submitted to the jury under proper instructions. *Lewis v. Archbell*, 205.

2. Where, in a suit to enjoin the violation of a condition in a contract of employment providing that the employee should not engage in the same business in competition with the employer in a restricted area for a definite time after the termination of the employment for any reason whatsoever, and the contract provides for the termination of the employment by either party for any reason, the question of whether the employee voluntarily left the employment is immaterial. *Moskin Bros. v. Swartzberg*, 539.

3. A contract not to engage in a certain business within a reasonable area for a reasonable length of time, which does not affect the interests of the public, will not be declared void as being in unreasonable restraint of trade. *Ibid.*

4. A condition in a contract of employment that the employee should not engage in the same business in competition with the employer after the termination of the employment, to be effective for a period of two years within twelve miles of any one of the employer's stores, is not one in unreasonable restraint of trade against public policy, and in a suit by the employer to restrain the violation of the condition, a judgment permanently restraining the defendant from violating the condition for the period of time stipulated therein upon proper findings and conclusion of law will be affirmed. *Ibid.*

h Gaming Contracts

1. Where there is evidence that contracts set up by certain defendants in an action by the receiver of a brokerage business were founded upon speculation and based upon "margins," and that no actual delivery of the stock was intended by the parties: *Held*, the evidence is sufficient to support a finding that the contracts were void under C. S., 2144, and the finding is as conclusive as the verdict of a jury, and the judgment that such contracts were absolutely void will be sustained. *Martin v. Bush*, 93.

2. Where in an action by an assignee and trustee under C. S., ch. 28, it is alleged that one of the defendants was a partner in the business of the assignor and liable for the debts of the firm, and the other defendants admit this allegation and set up and seek to recover of the plaintiff and the alleged partner on contract with the assignor, the alleged partner is a defendant in the action on the contracts and her answer setting up the defense that the contracts were void under C. S., 2144, as gambling contracts, places the burden on the other defendants to prove that the contracts were lawful. C. S., 2146. *Ibid.*

B Construction and Operation.

d Place and Time of Performance

1. Where in an action upon a contract under the terms of which the grantee of lands agrees to pay to the plaintiff a certain amount per

CONTRACTS B d—*Continued.*

acre for services rendered by the plaintiff in the purchase of the land, the amount to be paid upon the sale of the land by the grantee: *Held,* the contract specifying no time within which the sale was to be made, the doctrine of reasonable time applies, but an issue making the mere lapse of time directing and conclusive upon the question of whether the grantee should have sold the land under the agreement is erroneous, the issue submitted should have been framed in such a way as to enable the jury to find from the evidence whether the grantee arbitrarily or unreasonably refused to sell or whether by the exercise of due diligence he could have sold the land at a fair price. *Graves v. O'Connor,* 231.

F Actions for Breach.

a Parties

1. Where a company contracts to make a loan to a husband and wife to be secured by a mortgage on lands held by them by the entireties, and the husband dies pending the making of the loan, and the wife alone brings action to recover damages for breach of the contract by the loaning company: *Held,* the personal representative of the husband is a necessary party to the action and the defendant's demurrer should have been sustained. *Yonge v. Ins. Co.,* 16.

b Necessity of Performance, Tender, or Readiness to Perform

1. A party to a contract may not recover damages of the other party thereto for its breach when his own breach has caused the failure of the other to perform his part thereof. *Savage v. McGlawhorn,* 427.

CONTRACTORS—Surety bonds of see Principal and Surety; liability of contractor upon unconditional acceptance of subcontractor's assignment see Assignments C a 1.

CORPORATION COMMISSION—Presumption of approval of consolidation of Banks see Banks and Banking J a

CORPORATIONS (Service of process upon foreign see Process B d).

C Officers and Directors.

a Election, Appointment and Tenure

1. Where an educational institution, incorporated by private act of the Legislature, is granted a charter providing that four of the trustees named therein should hold office for the period of one year, and four others for a period of two years, and four others for a period of three years, and that their successors should be elected for a term of three years, and there is no provision that the trustees should hold office until their successors are elected, upon the trustees named in the charter continuing in office after the expiration of their term as provided therein: *Held,* no one but the corporation can be heard to complain, the general rule being that the failure of a corporation to elect officers or directors does not necessarily end the terms of those previously elected. *Martin v. Board of Trustees,* 691.

CORPORATIONS—*Continued.*

D Stock.

f "Blue Sky Law"

1. The "Blue Sky" law of the State enacted for the protection of investors in preventing the promotion of "wild-cat" schemes, chapter 71(A), N. C. Code of 1927, applies where money is invested in stock, securities, profit-sharing agreements, etc., with the purpose of securing an income from the employment of the money, and a contract whereby the owner of a copyright system gives the exclusive right to another to operate the system in certain counties, and in return is to receive a percentage of the gross receipts from the operation of the system, with further provision for a division of net profits from sales or contracts written by either party, does not contemplate the placing of money in a way to secure an income from its employment, but the earning of a portion of the gross receipts in return for individual services, and the agreement is not a profit-sharing scheme or investment contract within the intent and meaning of the statute. *S. v. Heath*, 135.

G Corporate Powers and Liabilities.

a Express and Implied Powers

1. Where a corporation has acquired by deed a permanent right-of-way over the lands of the original grantor for a railroad, it is not necessary that the corporation have the charter right to operate as a common carrier in order to use the right-of-way for a private railroad necessary to the carrying out of the powers expressly given it in its charter. *Grady v. Tile Co.*, 511.

c Authority of Officers and Agents to Bind Corporation

1. While the president of a corporation has ordinarily only the authority to make contracts binding on the corporation by resolution of the board of directors, when this position is combined with that of general manager the limitation of his power as the former does not apply to curtail his powers as general manager, and as the latter he may generally bind the corporation in all matters within the scope of its powers. *Lumber Co. v. Elias*, 103.

2. Where a corporation existing under the laws of this State has conferred upon it the power to acquire stock in competitive corporations, a contract for the purchase of such stock made by its general manager falls within the scope of his powers and is binding on the corporation without a resolution by the board of directors authorizing such purchase when the contract is made in good faith for its advantage. *Ibid.*

d Property and Conveyances

1. Where the charter of an educational institution authorizes the trustees to hold real and personal property for the corporation, and a deed is executed conveying the title to land to the trustees, and the trustees authorize a deed of trust from the corporation which is executed as its deed, and the deed of trust is foreclosed according to its terms, and the trustee in the deed executes a deed to the purchaser, and the trustees of the institution also execute a deed to the property to the purchaser at the sale: *Held*, neither the corporation nor the trustees can claim any interest in the

CORPORATIONS G d—*Continued.*

property and the conveyances conveyed the legal and equitable titles, respectively, to the purchaser at the sale who may transfer a good and indefeasible title thereto, and the fact that at the time of the execution of the deed by the trustees their terms of office under the charter had expired and their successors not elected does not alter this result, and the vendee of the purchaser at the foreclosure sale may not successfully maintain that the title offered was not good on account of the failure of the corporation to elect successors to the original trustees named in the statute. *Martin v. Board of Trustees,* 691.

g Ratification by Corporation of Acts of Officers or Agents

1. Where a contract is made by an officer of a corporation in good faith and for its benefit with knowledge of its board of directors, the corporation by knowingly accepting the benefits of the contract may become bound by its terms by ratification thereof, though the one acting for it may not have had authority express or implied to make the contract in its behalf. *Lumber Co. v. Elias,* 103.

H Insolvency and Receivership.

a Liabilities and Contracts Enforceable against Receiver

1. A receiver of an insolvent corporation may be sued for damages for breach of an executory contract of the corporation by permission of court, *Wade v. Loan Association,* 196 N. C., 171, in which the action was upon an executory contract of employment, cited and distinguished. *Lamson Co. v. Morehead,* 164.

COUNTIES—County highways see Highways C; bonds of county officers see Principal and Surety B c; sheriffs see Sheriffs; taxation see Taxation.

COURTS (Original jurisdiction of Supreme Court see State E, appellate jurisdiction of see Appeal and Error; administration of Federal Employers' Liability Act see Master and Servant E a; removal of causes see Removal of Causes; contempt see Contempt).

A Superior Courts.

a Jurisdiction (of criminal cases see Criminal Law D; of action for cancellation of instruments see Cancellation of Instruments B a)

1. Where, in an action against the receiver of an insolvent corporation for breach of an executory contract, the sum demanded in good faith exceeds two hundred dollars, the Superior Court has jurisdiction, the plaintiff being entitled to recover thereon upon a proper showing, the contract not being an executory contract of employment invalidated by the receivership. *Lamson Co. v. Morehead,* 164.

CRIMINAL LAW (Particular crimes see Particular Titles of Crimes; pleadings in criminal cases see Indictment).

B Capacity to Commit and Responsibility for Crime.

a Mental Capacity as Affected by Intoxicating Liquor or Disease

1. Where the prisoner on trial for a capital felony relies upon his evidence tending to show that he was too intoxicated at the time of the commission of the crime to have a criminal intent, and there

CRIMINAL LAW B a—*Continued.*

is evidence to the contrary offered by the State, the conflicting evidence raises an issue of fact for the determination of the jury under proper instructions from the court. *S. v. Lawrence*, 481.

C Parties and Offenses.

a Principals

1. Where a number of persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. *S. v. Beal*, 278.

b Aiders and Abettors

1. Mere presence, even with the intention of assisting in the commission of a crime, does not render a party an aider or abettor therein unless the intention to assist is communicated to the perpetrator, but if a party, being present, does something that will incite, encourage, or assist the actual commission of a crime he is guilty as an aider and abettor. *S. v. Hoffman*, 328.

D Jurisdiction of Criminal Cases.

b Degree of Crime

1. While formerly under the common law a conspiracy was a misdemeanor, is changed by statute to a felony, C. S., 4173, applying to crimes of this class, providing that in the case of an offense done in secrecy and malice where the punishment is not provided for in the statute, the punishment may be by imprisonment in the State prison, and C. S., 4171, defining crimes so punishable as felonies, and the Superior Court has original jurisdiction of a prosecution for a conspiracy to kill, and the recorder's court does not have exclusive original jurisdiction thereof, and improper venue must be met by a plea in abatement made in apt time, C. S., 4606, before plea of not guilty. *S. v. Ritter*, 116.

F Former Jeopardy.

c Mistrials and New Trials

1. Where on appeal of a prosecution for criminal conspiracy a new trial is awarded because of error in the admission of certain evidence, upon the new trial in the Superior Court the defendant's plea of former jeopardy and motion to dismiss is properly disallowed, and where the admission of evidence and the charge of the court is in accordance with the opinion in the former appeal the defendant's exceptions thereto cannot be sustained. *S. v. Ritter*, 116.

2. Where in a criminal prosecution a mistrial is properly ordered, defendants' subsequent plea of former jeopardy cannot be sustained. *S. v. Beal*, 278.

d Same Offense

1. Where a defendant is bound over to the County Court on two warrants for issuing worthless checks on different dates, and is acquitted as to one and convicted as to the other, and appeals to the Superior Court, and in the trial in the Superior Court the evidence relates to the charge upon which he had been acquitted in the County Court, upon the jury's acceptance of his plea of former

CRIMINAL LAW F d—*Continued.*

acquittal, it is error for the trial court to order another trial, and upon conviction therein the judgment will be arrested on appeal. *S. v. Ross*, 461.

G Evidence (Of particular crimes see Particular Titles of Crimes).

a Presumptions and Burden of Proof

1. The failure of a defendant to testify in his own behalf does not raise any presumption against him, and is not a proper subject of comment by the solicitor in his argument to the jury, though his failure to testify necessarily leaves the jury to infer the facts without the benefit of any statement from him. *S. v. Beal*, 278.

2. Ambiguous instruction as to burden of proof entitles defendant to new trial. *S. v. Cornett*, 634.

b Facts in Issue and Relevant to Issues

1. Where in a prosecution for manufacturing and possessing materials for the manufacture of intoxicating liquor a witness for the State has testified that the two defendants had brought a still to his place and had set it up in a field and manufactured whiskey, and had told officers where the whiskey could be found: *Held*, the finding of the whiskey at the place designated is incompetent as an independent fact, but taken in connection with the evidence that the defendants were acting together in procuring a still and manufacturing whiskey, it was a part of the same transaction, and the admission of testimony of another witness corroborating the declaration of the first as to the location of the whiskey is not error. *S. v. Hall*, 685.

g Flight as Evidence of Guilt

1. Where in a conspiracy of strikers to resist officers of the law to the death and shoot to kill if their plans were interfered with, resulting in the death of an officer, the fact that one of the strike leaders immediately departed from the community after the murder is a competent circumstance to be considered by the jury with other evidence in the case. *S. v. Beal*, 278.

j Testimony of Convicts, Accomplices, Defendants and Codefendants

1. Where the defendants in a criminal prosecution testify in their own behalf, an instruction that their testimony should be scrutinized with care to ascertain to what extent, if any, it was warped or biased by their interest, and that should the jury then believe them their testimony should be given the same credit as if they were disinterested, is free from error. *S. v. Beal*, 278.

k Acts and Declarations of Conspirators

1. Where two or more persons associate themselves together in a criminal conspiracy, any act or declaration made by one of them in the presence of the others in furtherance of the common object and forming a part of the *res gestæ* is competent in evidence against the others. *S. v. Ritter*, 116; *S. v. Beal*, 278.

m Weight and Sufficiency (Nonsuit see Criminal Law I j; in prosecution of particular offenses see Particular Titles of Crimes).

1. Evidence sufficient to take the case to the jury in a criminal action must tend to prove the fact in issue or reasonably conduce to its

CRIMINAL LAW G m—*Continued.*

conclusion as a fair, logical and legitimate deduction, and not merely such as raises a suspicion or conjecture of guilt. *S. v. Johnson,* 429.

r Impeaching, Contradicting, or Corroborating Witness

1. Where the evidence under an indictment for conspiracy by strikers to resist officers of the law to the death if their plans were interfered with, resulting in the killing of one of the officers, it is competent for the State in cross-examining one of the defendants, a representative of the union conducting the strike, as to his circulating locally a Communist paper containing several communications adversely criticizing the police officers, the defendant having previously testified without objection to a letter written by him and published in the said paper. *S. v. Beal,* 278.

I Trial of Criminal Cases (Trial of actions for particular offenses see Particular Titles of Crimes).

c Course and Conduct of Trial and Fair, Impartial Trial

1. The mere fact that the officers of the court guarded the outside of the court-room with State militia during the course of the prisoner's trial in a criminal prosecution, for the prisoner's protection, does not alone entitle the prisoner to a new trial on appeal upon the ground that a fair and impartial trial, guaranteed by the Constitution, had not been given him, where it appears that no demonstration had been made against him or anything done that could have prejudiced his rights, and his exception to the refusal of the trial court to allow his motion that the guard be dismissed will not be sustained on appeal, ordinarily matters of this kind being within the sound discretion of the court. *S. v. Lawrence,* 481.

e Arguments and Conduct of Counsel

1. Motion for new trial for improper argument of solicitor is addressed to discretion of court. *S. v. Beal,* 278.

f Consolidation of Actions

1. Where the trial of two separate criminal indictments are consolidated by the judge and tried together as authorized by C. S., 4622, and a general verdict of guilty is returned by the jury, the verdict will apply to each indictment, and judgment pronounced on one of them, but execution suspended on terms agreed upon, and judgment and sentence entered as to the other, is not objectionable on the ground that only one judgment should have been entered, and *held* further, the sentence being concurrent, the defendant was not prejudiced. *S. v. Harvell,* 599.

g Instructions (In prosecutions for particular crimes see Particular Titles of Crimes).

1. In the course of a prosecution for conspiracy an explanation to prospective jurors why some of the alleged conspirators were being tried while others were not, and proof of the fact during the trial is held not to be prejudicial error entitling the defendants to a new trial. *S. v. Ritter,* 116.

2. Where evidence is introduced only for the purpose of corroboration, and at the time of its introduction the court instructs the jury

CRIMINAL LAW I g—*Continued.*

that it was to be considered only for that purpose and not as substantive evidence, his failure to likewise so instruct them in his charge is not reversible error in the absence of a request for an instruction to that effect. Rules of Practice in the Supreme Court No. 21. *S. v. Jackson,* 321.

3. The use of the words "the evidence tends to show" by the trial court in his charge to the jury, applied both to the evidence for the State and for the defendant, is not an expression by him upon the weight and credibility of the evidence forbidden by C. S., 564. *Ibid.*

4. An error made by the judge in misstating exactly an admission in his charge to the jury, must be brought to his attention in order to afford time and opportunity for correction. *S. v. Sloan,* 598.

5. The burden is on the State in a criminal action to prove the defendant's guilt beyond a reasonable doubt, and where the trial court instructs the jury that if they find by the greater weight of the evidence that the defendant committed the offense charged, and found him guilty beyond a reasonable doubt, they should return a verdict of guilty, a new trial will be awarded on appeal, it being impossible to determine which of the conflicting instructions the jury followed. *S. v. Cornett,* 634.

j Nonsuit

1. Upon motion as of nonsuit in a criminal prosecution the evidence is to be considered in the light most favorable to the State, and if there be any evidence tending to prove the fact of guilt or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture of guilt, it is for the jury to say whether they are convinced beyond a reasonable doubt of the fact of guilt. *S. v. Beal,* 278.

2. Where the defendants are tried for violating C. S., 4214, in making an assault with a deadly weapon with intent to kill, etc., the action will not be dismissed when the undisputed evidence tends to show the assault was made with a deadly weapon. *S. v. Hefner,* 778.

l Conviction of Lesser Degree of Crime

1. Where all the evidence tends to show that the crime of rape was committed as alleged in the bill of indictment, and the defendant relies solely upon an alibi, and does not contend that he might be found guilty of a lesser degree of the crime, and introduces no evidence to that effect, and makes no request that the court instruct the jury thereon, the failure of the court to so instruct the jury will not be held for error, C. S., 4639, 4640, not applying. *S. v. Jackson,* 321.

J Motions to Set Aside Verdict, Mistrial, New Trial and Arrest of Judgment (Presence of guards at trial not ground for new trial see hereunder I c 1; motion in arrest properly refused on indictment sufficiently charging rape see Rape C a).

CRIMINAL LAW J—*Continued.*

b Disqualification of or Misconduct of or Affecting Juror as Grounds for New Trial

1. The trial judge has the power to order a mistrial in criminal cases as a matter of necessity where one of the jurors becomes insane during the course of the trial, but in capital cases he must find the facts for review, and where the court has ordered a mistrial upon a proper finding of fact, the court has the power, upon learning that one of the defendants had voluntarily absented himself from the court room at the time the mistrial was ordered, to strike out the order of recess and repeat the proceedings in the presence of all the defendants. *S. v. Beal,* 278.

2. A motion to set aside the verdict and for a new trial on the ground of alleged prejudicial appeals by the solicitor in his argument to the jury is addressed to the sound discretion of the trial court which will not be reviewed on appeal unless the impropriety of counsel be gross and calculated to prejudice the jury, and where the record discloses that the court promptly stopped the solicitor on objection of defendants, and at one time of its own motion directed the solicitor to stay within the record, and there is nothing in the record to show the character of the argument or that the judge failed to do his full duty, the refusal of the motion by the court will not be held for error. *Ibid.*

3. Where the trial judge refuses to set aside a verdict for relationship of a juror with the prosecuting witness in a criminal case upon his finding that the trial had been fair, and on the defendant's appeal there is no finding as to whether the defendant's counsel was misled by the juror's failure, upon questioning, to disclose this fact, the case will be remanded to the end that the court find whether the defendant's counsel was misled, and upon an affirmative finding the verdict should be set aside. *S. v. Tart,* 699.

d Newly Discovered Evidence as Grounds for New Trial

1. Defendant's motion for a new trial in a criminal prosecution on the ground of newly discovered evidence is addressed to the sound discretion of the trial court and the refusal of the motion is not reviewable on appeal. *S. v. Jackson,* 321.

e Motion to Set Aside Verdict

1. A motion to set aside a verdict in a criminal action on the ground that it is against the weight of the evidence is addressed to the sound discretion of the trial court, and his action is not reviewable on appeal in the absence of abuse. *S. v. Harvell,* 599.

K Judgment and Sentence.

e Requisites in Capital Cases

1. The entry of judgment of the court on the verdict of guilty of a capital felony by the clerk of the court on its minutes and signed by the judge is not a sufficient compliance with the provisions of C. S., 4659, its mandatory provisions requiring the judgment to be written and signed by the judge, and where it appears of record that he has failed so to do the case will be remanded. *S. v. Jackson,* 321.

CRIMINAL LAW—*Continued.*

L Appeal in Criminal Cases (Motions for new trial in trial court see Criminal Law J).

a Prosecution of Appeals Under Rules of Court

1. Whether the Supreme Court acquires jurisdiction of an appeal in *forma pauperis* from a conviction of a capital felony when the affidavit for leave to appeal fails to state, as required by C. S., 4651, that the "application is in good faith," *quære?* and where the appeal has not been prosecuted as required by the Rules of Court the appeal will be dismissed upon the motion of the Attorney-General after an examination of the record proper for errors appearing upon its face. *S. v. Bynum*, 376; *S. v. Sharpe*, 377.

2. Where the appellant in a criminal action has failed to have his case docketed in the time required by the Rules of Practice in the Supreme Court, in order to preserve his right to appeal it is required that he file an application for a *certiorari*, addressed to the sound discretion of the Supreme Court, and show a good and sufficient reason for granting his motion therefor, and where this has not been done the appeal will be dismissed upon motion of the State. *S. v. Harris*, 377.

3. Where the prisoner convicted of a capital felony is allowed to appeal in *forma pauperis*, and an agreed case on appeal has been filed, but no further steps taken, the appeal will be dismissed on motion of the Attorney-General for noncompliance with the Rules of Court governing appeals, after an examination of the record and the case for substantial error. *S. v. Massey*, 601.

4. Where the defendants convicted of a capital offense give notice of appeal, but nothing is done toward perfecting the same, the motion of the Attorney-General to docket and dismiss the appeal will be allowed, no error appearing upon the face of the record proper. *S. v. Hayeslipps*, 636.

d Record

1. An exception to the exclusion of testimony of a witness offered as a sustaining witness to a character witness is not properly presented for review on appeal when it is not made to appear of record that the witness would have qualified and given the evidence suggested. *S. v. Beal*, 278.

2. Where the charge of the trial court to the jury does not appear of record on appeal it will be conclusively presumed that the court correctly charged the law arising upon the evidence. *S. v. Lawrence*, 481.

e Review

1. Where a witness had not been challenged upon her *voir dire* to test her competency to testify as a witness, and has been sworn to speak the truth as required by C. S., 3189, 3190, 3191, questions asked her upon cross-examination by the solicitor as to her religious beliefs for the purpose of impeaching her credibility, if error, will not be held prejudicial or harmful when the answers of the witnesses, taken in connection with her previous testimony, do not show that she intended to express a disqualifying disbelief, it

CRIMINAL LAW L e—*Continued.*

appearing that no appreciable harm has come to the defendants, if harm at all, and the verdict and judgment will not be disturbed upon defendants' exceptions to the questions. The change in the Constitution on the subject observed and discussed by STACY, C. J., but effect not determined. *S. v. Beal*, 278.

2. In order for an award of a new trial on appeal for alleged erroneous admission of evidence upon the trial, the appellant must show error positive and tangible that has affected his rights substantially and not merely theoretically, *e. g.*, that a different result would have likely ensued. *Ibid.*

3. Where indictments charging conspiracy to commit a homicide resulting in murder and lesser degrees of the crime have been consolidated without objection of the defendants, upon the motion of defendants in arrest of judgment on the ground that they were not required to plead to the bill charging the various lesser degrees of the offense, it may be said that the plea of not guilty to the bill charging the greatest offense applied to any and all offenses subsequently added thereto, without objection, relating to the same transaction, but the conviction of the defendants of the greatest degree of the crime is not challenged by the motion in arrest, and the sentence for the greatest degree being longer than the combined sentences for the lesser degrees, and the sentences running concurrently, error committed with respect to the lesser degrees would not affect the verdict and judgment on conviction of the greatest degree. *Ibid.*

4. On defendant's appeal from a conviction of murder, his admission on cross-examination that he had been on the roads and "they claimed I took an automobile," is not sufficiently different from an instruction, "the defendant admits a criminal record more or less, and that he was convicted of larceny" to make the statement in the charge reversible error. *S. v. Sloan*, 598.

5. Where a defendant has been convicted of having carnal knowledge of a girl under sixteen years of age, and it appears from the judge's finding of fact upon defendant's motion to set the verdict aside, that a juror serving on the case was within the 9th degree of relationship to the prosecuting witness, but failed to set aside the verdict on his finding that the juror was not prejudiced, the latter finding is regarded as a conclusion of law rather than one of fact, and is not binding on the Supreme Court upon appeal. *S. v. Tart*, 699.

6. Where the evidence is sufficient of an assault with a deadly weapon with intent to kill, not resulting in death, a charge by the judge to the jury that "serious injury" included "anything that would cause a breach of the peace," is held not to be reversible error to the defendant's prejudice where all the evidence tends to show that serious injury was inflicted in violation of the statute. *S. v. Hefner*, 778.

g Nature and Grounds of Appellate Jurisdiction in Criminal Cases

1. The Supreme Court is confined to matters of law or legal inference upon an appeal in a criminal prosecution. Article IV, section 8. *S. v. Lawrence*, 481.

CRIMINAL LAW L—*Continued.*

f Disposition of Cause

1. Under the provisions of C. S., 4643, the reversal of a judgment of guilty has the force and effect of a verdict of "not guilty." *S. v. Corey*, 209.

DAMAGES.

C Grounds Therefor.

a Direct or Remote, Speculative and Contingent Injury

1. The plaintiff may not recover damages for breach by the defendant of a contract to ship fertilizer when the plaintiff's losses to crops are contingent, speculative, or merely possible, and are not such as in the ordinary course of things are reasonably proximate and certain. *Newbold v. Fertilizer Co.*, 552.

DEATH—Presumption of see Evidence G c 1.

DEEDS AND CONVEYANCES (Cancellation and rescission of see Cancellation and Rescission of Instruments; fraudulent conveyances see Fraudulent Conveyances; creation of easements see Easements).

A Requisites and Validity.

f Acknowledgment and Probate (Wife's right to convey without joinder of husband see Husband and Wife D d).

1. Where the husband has conveyed to his wife his title to lands held by them by the entireties, and the wife thereafter conveys her title by deed to the husband and herself, which deed is not probated under the requirements of C. S., 2515, with respect to the finding of the probate officer that the instrument was not unreasonable or injurious to her, the wife's conveyance is void in law, and does not operate as an estoppel by deed to her during her life or her heirs at law after her death. Art. X, sec. 6. *Capps v. Massey*, 196.

C Construction and Operation (Estoppel by deed see Estoppel A; chattels passing with realty see Fixtures A a).

a General Rules for Construction

1. In construing a deed such a construction should be given as is most agreeable to the intent of the grantor as expressed in instrument, and technical rules of construction serve only as aids to this end, the meaning of the deed depending largely upon the circumstances of the grantor as they appear in the deed itself. *Paul v. Paul*, 522.

c Estates and Interests Created (Easements created by deed see Easements A b)

1. Although a deed to lands executed and delivered prior to the effective force of C. S., 991, would not pass an estate in fee simple if the deed entirely omitted the word "heirs" or other appropriate words of inheritance, a deed executed before such date to a school committee "and their successors in office in fee simple" is sufficient to pass a fee simple title to the lands conveyed therein. *Tucker v. Smith*, 502.

2. A deed to lands to a school board in fee simple "for the use and benefit of the white children in said school district and no further"

DEEDS AND CONVEYANCES C c—*Continued.*

merely marks out the use and purpose of the conveyance, and does not impose a trust or condition subsequent working a reversion of the title upon condition broken. *Ibid.*

3. Where a deed is executed to "M. and the heirs of her body by her husband S. begotten, or upon failure thereafter her death to the nearest heirs of S.," and at the date of the execution of the deed M. has children living: *Held*, the deed conveys a fee tail special to M. which is converted to a fee simple by C. S., 1734, defeasible upon her dying without surviving children by S., and her children do not take as tenants in common with her, C. S., 1739, providing that a limitation to the heirs of a living person shall be construed to be the children of such person, being applicable only when there is no precedent estate conveyed to the living person, and the condition as to the failure of heirs referring to the death of M. without surviving children and not to the birth of issue, there being issue born at the date of the execution of the deed, and the ulterior limitation is not barred by the birth of such issue. *Paul v. Paul*, 522.

f Conditions and Covenants

1. Where a deed to lands is conditioned upon the payment by the grantee of a stipulated sum in the future to persons designated by the grantor, upon acceptance of the deed by the grantee he is bound to the performance of the condition. *In re Peaden*, 486.

D Boundaries.

e Conflicting Evidence and Issues of Fact

1. Where both parties in an action in ejectment claim title by adverse possession, the plaintiff claiming presumptive possession to the outside boundaries of his deed, with conflicting evidence as to the boundaries called for in the deed: *Held*, an issue of fact is raised for the determination of the jury, and where a court survey, made and used without objection of either party, is introduced in evidence, a reference to the map as the "court map" by the trial court in his charge to the jury will not be held for reversible error, it appearing that an intelligent jury must have understood the correct instructions in regard thereto. *Ware v. Knight*, 251.

2. Where the defendant is the owner of lands along the Ocean front and enters possession under his deed which gives the right of ingress and egress over lands extending westward to a "Banks Channel" to cease whenever the grantor should open and establish streets or alleys extending from "Banks Channel" to the Ocean either to the north or south of the premises conveyed: *Held*, the expression "to the north or south of the premises," with reference to the streets or alleys contemplated, is ambiguous as to their location, leaving the question of their location for the jury, and an instruction that the streets or alleys opened up must have been contiguous to defendant's lots or reasonably near thereto so as to make it reasonably convenient to the owners to pass to the Ocean or Sound is not error to the defendant's prejudice, and defendant's request for a directed verdict in his favor as a matter of law was properly denied. *Wallace v. Bellamy*, 759.

DEEDS AND CONVEYANCES—*Continued.*

F Timber Deeds.

a Right of Parties Under Deeds of Standing Timber

1. A deed to standing timber upon lands with the right of ingress, egress, etc., for the purpose of cutting and removing the timber conveyed, such right is to be exercised in the ordinary way and by the ordinary methods incident to its reasonable enjoyment does not subject the grantee to the payment of damages caused to the land from stopping ditches and trees falling upon pasture fences when it has not been careless or negligent in the exercise of this right. *Lewis v. Lumber Co.*, 718.

DEMURRER see Pleadings D.

DESCENT AND DISTRIBUTION.

B Person Entitled to Distribution and Their Respective Shares.

d Father or Mother of Intestate

1. Where an intestate dies leaving her surviving her father, and has no husband, brothers or sisters, or issue of brothers or sisters, her father is entitled to distribution under the canons of descent. C. S., 137, subsection 6. *In re Peaden*, 486.

DYING DECLARATIONS see Homicide G c.

EASEMENTS (One taking possession under easement may not claim adversely see Adverse Possession A f 1).

A Creation.

a By Prescription

1. Evidence that the plaintiff had used a road upon the private land of the defendant for ingress or egress to his own land for a sufficient period of time, had worked upon it, and used it continuously, openly and adversely, is *held* sufficient evidence of adverse user to be submitted to the jury upon the issue as to whether he had acquired an easement thereover. *Colvin v. Power Co.*, 353.

2. In order for the owners of land along a roadway to acquire prescriptive right of ingress and egress thereover the use must be continuous and adverse to the owner of the road, and for a sufficient length of time to confer the right, and the fact that in going over the road at some period bars had to be laid down is for the jury to consider upon the question of adverse user. *Ibid.*

b By Deed

1. Where a deed conveys standing timber with the right to construct and use roads, tramways and railroads thereon for the purpose of cutting and removing the trees conveyed, and also conveys a right-of-way sixty feet wide for a main railroad as well as any branch road planned by the grantee, its successors and assigns, the right-of-way to be used by it permanently, the consideration expressed not being confined to the right to the trees alone: *Held*, although the right to enter upon the land for the purpose of cutting and removing the trees expired when the trees conveyed had been removed, by the plain language of the deed a permanent right-of-way sixty feet wide was conveyed to the grantee, and one claiming

EASEMENTS A b—*Continued.*

under a deed from the grantee has the right to the easement and its use for other private purposes, in this case the right to transport clay for brick over the land. *Grady v. Tile Co.*, 511; *Lewis v. Lumber Co.*, 718.

EDUCATION see Schools and School Districts.

EJECTMENT.

A Right of Action and Defenses (Right of action in upon termination of lease see Landlord and Tenant D d 1).

a Title of Plaintiff

1. In an action in ejectment the plaintiff may undertake to establish his title by sufficient adverse possession under known and visible lines and boundaries. *Ware v. Knight*, 251.

ELECTIONS.

B Notice and Time of Elections.

a Statutory Provisions as to Date of Elections

1. Where a statute directs that an election be held by the voters of a municipality on a certain day of the week, 18 April, and that day of the week is the 19th, and the election is accordingly had on the 19th: *Held*, the error in the statute is patent upon its face and too technical to declare the election held thereunder invalid on that account. *Penland v. Bryson City*, 140.

I Contested Elections.

a Right to Contest Election, Parties and Process

1. In order for the taxpayers of a municipality to set aside the result of an election therein, it is required that they must not unduly delay their action for that purpose, and it must appear that the rights of innocent parties have not intervened, and that the action was brought in good faith, with reasonable diligence, and sets forth a substantial cause, or the action will be dismissed. *Penland v. Bryson City*, 140.

d Appeal and Error

1. Where an election to determine the choice of the voters of a town for or against enlarging its boundaries is required to be held under the Australian Ballot System, and it appears that the law was not strictly enforced, the result of the election will not be declared invalid by the courts on that account if it appears that the voters had freely voted their choice, without influence from others at the poll, and that there was "a free ballot and a fair count." *Penland v. Bryson City*, 140.

ELECTRICITY.

A Duties and Liabilities in Respect Thereto.

a Duty to Inspect and Repair Apparatus

1. Electricity is a most deadly and dangerous power and requires frequent inspection and unremitting diligence on the part of those who furnish it for use. *Peters v. Woolen Mills*, 753.

EMINENT DOMAIN.

A Nature and Extent of Power.

c Condemnation Before Adjudication of Right to Compensation

1. Upon pertinent allegations of the complaint by the State *ex rel.* Transportation Advisory Commission for the immediate possession of lands necessary to be conveyed to the U. S. Government for the inland waterway, a demurrer to the complaint by parties claiming title to the *locus in quo* is bad when it is made to appear that immediate possession is necessary to prevent delay in the construction of the canal and the rights of the claimants to just compensation is preserved and the faith and credit of the State is pledged for its payment in the event that they are able to establish their title, and an order of the court giving such immediate possession is not error, the right of the State thereto for this purpose being paramount. *Myers v. Wilmington Causeway Co.*, 169.

C Compensation.

e Measure and Amount of Compensation

1. The measure of damages to be awarded the owner of lands for the taking of a part thereof by a town for widening a street is the difference in the fair market value of his land, before and after taking, less the value of special benefits to him. *Ward v. Waynesville*, 273.

D Proceedings to Take Property and Assess Compensation.

a Procedure and Pleadings

1. Under the provisions of C. S., 2792 (Sup., 1924), a city may in the same action proceed to acquire land for a street by condemnation and to have the assessment made for street improvements on the lands of the abutting owner. *Efird v. Winston-Salem*, 33.

2. Where in condemnation proceedings under the provisions of chapter 48, Public Laws of 1927, as amended by chapter 220, Public Laws of 1929, for the condemnation of defendant's land for public park purposes, an amendment to the answer is filed asking damages for loss of business by reason of the condemnation: *Held*, the amounts demanded in the amended answer do not constitute a cross-action or counterclaim, but only to a demand for compensation which should be raised by exceptions aptly taken in the proceedings. As to whether cross-actions or counterclaims can be set up in condemnation proceedings instituted by the State, *quœre? S. v. Lumber Co.*, 199.

3. On appeal from judgment sustaining the demurrer to the answer of respondents in condemnation proceedings, the Supreme Court will not decide the various elements of compensation allowable to the respondents, it being necessary that such questions be raised by exceptions aptly taken in the proceedings to assess compensation. *Ibid.*

4. The remedy afforded by statute to the owner of lands for damages for the taking of his property for State highways is exclusive, and a motion as of nonsuit in an action therefor against a city which had agreed to save the Highway Commission harmless on claims for compensation within the city limits is properly allowed. C. S., 3846(bb), 3846(ff). *Long v. Randleman*, 344.

EMINENT DOMAIN D—*Continued.*

b Evidence

1. Where in proceedings against a town for compensation for lands taken by it in widening its streets, witnesses for the town have testified as to the value of the plaintiff's lands before and after the taking of a part thereof, but have not testified that plaintiff received any special benefits, it is proper for the plaintiff on cross-examination to ask them if they would give, after the taking, the amount of the plaintiff's proportionate part of the improvement assessments, both as impeaching their testimony and as ascertaining if they had considered the improvements to the street in forming an opinion as to the value of the land after the taking, and *held further*, error, if any, in the admission of the evidence was not prejudicial in view of the fact that the court expressly charged the jury that the street assessments could not be taken into consideration as an element of damages. *Ward v. Waynesville*, 273.

EMPLOYER AND EMPLOYEE see Master and Servant.

EQUITY see Particular Forms of Equitable Remedies, Particular Titles of Equitable Rights and Titles; Laches see Cancellation and Rescission of Instruments B c.

ESCAPE.

A Nature and Elements of Offense.

a Definition of Escape

1. An escape is the unlawful departure of a prisoner lawfully confined from the limits of his custody, or his wrongful liberation by a relaxation of his imprisonment through the neglect or malfeasance of the officer lawfully having him in charge, and an escape is effected when the prisoner thus gains his liberty before he is delivered in due course of law. *Sutton v. Williams*, 546.

ESTATES see Life Estates, Husband and Wife G a; estates created by deed or will see Deeds and Conveyances C c; Wills E b.

ESTOPPEL.

A By Deed.

a Creation and Operation in General

1. Where the husband conveys land to his wife, the title to which was vested in them as tenants by the entireties, and the husband survives the wife, the husband and those claiming under him as his heirs at law are estopped by his deed from claiming the land, but the wife's deed to the husband, not probated according to C. S., 2515, is void, and does not estop her heirs. *Capps v. Massey*, 196.

B By Record (See, also, Evidence L a 1; Judgments L b).

a Creation and Operation in General

1. Where creditors bring suit to set aside a debtor's encumbrance on land, alleging that the mortgage or deed of trust was not bona fide and that the note it secured had been paid, and the debtor files an affidavit in the action that the note had not been paid, the judg-

ESTOPPEL B a—*Continued.*

ment in the suit works an estoppel against the debtor from maintaining in a suit to foreclose the same encumbrance that his affidavit was erroneous and that the debt had been paid contrary to his affidavit filed in the previous action. *Rand v. Gillett*, 462.

C Equitable Estoppel see Mortgages H p 2; Insurance K a 2.

EVIDENCE (Reception of evidence see Trial B; nonsuit on see Trial D a; evidence in criminal cases see Criminal Law G; evidence of negligence see Negligence, Master and Servant C, D, E; Highways B i; Railroads D; Street Railroads; evidence in particular proceedings or action see Eminent Domain D b, Reference B c, and Particular Titles of actions; evidence of partnership see Partnership A c).

A Judicial Notice.

a Public Acts, Governmental Officers, etc.

1. When necessary for the determination of a case on appeal, the Supreme Court will take judicial notice of the counties comprising a judicial district, and that a judge holding a term in one of the counties was a special judge appointed by the Governor under the authority of chapter 137, Public Laws of 1929. *Reid v. Reid*, 740.

C Burden of Proof (In criminal cases see Criminal Law G a; in actions on notes see Bills and Notes H a; in action to recover tax see Taxation E c 3; of proving defense of statute of limitations see Limitation of Actions E c; of proving contract illegal as gaming contract see contracts A h 2; of proving contributory negligence see Negligence C d, and other particular heads).

c Interveners

1. The burden is on an intervener in an action to prove the issue raised by him. *Rogers v. Ray*, 577.

D Relevancy, Materiality and Competency in General.

e Privileged Communications

1. In a suit in equity to set aside a judgment rendered in an action at law for fraud, letters from the plaintiff in the former action to his wife respecting fraud in that action are properly excluded when the letters are obtained by a third party with the consent of the wife, the letters being privileged communications, C. S., 1801, and inadmissible against either husband or the wife. *McCoy v. Justice*, 602.

f Impeaching, contradicting or Corroborating Witness

1. Where, upon the trial of an action to recover damages for an alleged negligent personal injury, the defendant's counsel has asked the plaintiff on cross-examination, to impeach his credibility as a witness, "Why did you quit?" (the employment of defendant), which is answered, "They ran me off," it is competent for the plaintiff to further testify by way of explanation that he was told that "the insurance company would not let him work," this being an exception to the rule that evidence that defendant carried liability insurance is inadmissible, and testimony in corroboration of such explanation given by another witness is also competent. *Keller v. Furniture Co.*, 413.

EVIDENCE—*Continued.*

G Declarations (Dying declarations see Homicide G c).

c As to Date of Birth and Relationships

1. Where there is a presumption that the father of the plaintiff is dead, testimony of his declarations as to the plaintiff's age, material to the controversy, made *ante litem motam*, is competent, and where the evidence discloses that the plaintiff's father disappeared soon after the plaintiff's birth and his mother had married again, it is sufficient to admit declarations of this character. *Keller v. Furniture Co.*, 413.

I Documentary Evidence.

b Accounts, Records, and Private Writings

1. Where the question is for the jury as to the time a material furnisher in his action to enforce his lien has finally completed the delivery of the material to the building of the owner under construction and against which the lien has been filed, C. S., 2470, 2474, a clerk of a railroad company that had transported and delivered it at its destination and who had charge and control of the carrier's records relating to it, is competent on the trial to produce the bill of lading showing the time of its shipment, of the time of delivery at destination to a drayman for local delivery to the owner's premises, the probative force being for the jury to determine. *Supply Co. v. McCurry*, 799.

J Parol or Extrinsic Evidence Affecting Writings (Admissibility of parol evidence as to liabilities of parties to note see Bills and Notes D b 3).

a Explaining, Modifying, or Varying Terms of Written Instrument

1. Where the judgment relied on as an estoppel in a subsequent action is ambiguous as to the identity of a contract involved in both actions, parol evidence not inconsistent with the record of the former action is competent to identify the issue therein formerly adjudicated. *Savage v. McGlawhorn*, 427.

K Expert and Opinion Evidence (In criminal cases see Criminal Law G i).

b Subjects of Expert Testimony

1. Where a physician has qualified as an expert witness, his testimony as to the results of an injury, based upon the disclosure of an X-ray picture properly taken by a competent person and admitted in evidence, is competent and not objectionable upon the ground that his opinion was based upon assumed facts arising from matters neither proven nor admitted. *Eaker v. International Shoe Co.*, 379.

2. Where a witness has qualified as an expert with experience in reading and interpreting X-ray pictures, and has testified as to the extent of an injury based upon an X-ray picture properly introduced in evidence, his answer to a question as to the reliability of an X-ray picture that there was no way an X-ray picture could "fool" a physician merely amounts to a statement that an X-ray picture, properly taken, accurately produces a picture of human bones, and an exception to the answer will not be sustained on appeal. *Ibid.*

EVIDENCE K b—*Continued.*

3. Where the plaintiff has been injured while working at the defendant's machine, and seeks to recover damages therefor, it is not required that a witness be an expert in order to testify as to whether the machine that injured the plaintiff was approved and in general use, it being sufficient if the witness testify from his own knowledge and experience in such matters. *Keller v. Furniture Co.*, 413.

4. Where in an action on a life insurance policy the capacity of the deceased insured to have given notice of disability is in issue, it is competent for those having had knowledge of and an opportunity to observe the deceased to testify that his mental and physical condition was such that he had been wholly incapacitated from giving such notice, both as relevant and material to the inquiry and as a "shorthand statement of a collective fact." *Nelson v. Ins. Co.*, 443.

5. In the wife's action to recover damages for an alleged negligent personal injury it is competent for her husband to testify from his own observation both as to the fact and the extent of her suffering. *Pridgen v. Produce Co.*, 560.

L Evidence and Pleadings of Former Trial.

a Admissibility of Record in Former Trial

1. Where, in an action by a married woman to set aside her deed to her separate realty on the ground that the written consent of her husband was not obtained, the defense is set up that at the time she executed the deed she had been adandoned by her husband, C. S., 2530, and pleadings in her prior action for divorce, alleging abandonment, are introduced in evidence: *Held*, the wife is not estopped by the pleadings in the divorce proceedings from denying that she had been abandoned when abandonment was not an issue therein, but the allegations may be taken as some evidence of abandonment in the action to set aside her deed. *Keys v. Tuten*, 368.

EXECUTION.

B Property Subject to Execution.

a Interests in Land

1. Lands devised or conveyed to husband and wife as such carries to them the title by entirety and is not subject to execution of a judgment against either of them severally during their joint lives, the principle of *jus accrescendi* applying. *Winchester-Simmons Co. v. Cutler*, 709.

K Execution Against the Person.

a Wilful and Wanton Injury

1. Although negligence alone in the infliction of a personal injury is not sufficient to support an execution against the person of the defendant, intent to inflict injury may be constructive, and where the acts of the defendant are so reckless or indifferent to the safety of life or limb as to amount to wilfulness or wantonness, they are equivalent in spirit to actual intent, and, *Held*, the evidence in this case tending to show that the defendant and his driver, while

EXECUTION K a—*Continued.*

intoxicated, operated defendant's car recklessly and wilfully, was sufficient to warrant the submission of the issue and sustain an affirmative answer thereto. *Braxton v. Matthews*, 484.

EXECUTORS AND ADMINISTRATORS.

D Allowance and Payment of Claims.

c Funeral Expenses (Liability of husband for funeral expenses of deceased wife see Husband and Wife B g).

1. The obligation of the estate of a deceased to pay his funeral expenses is a preferential charge fixed by statute which implies a promise to pay for them. C. S., 93. *Brown v. Brown*, 473.

g Rights and Remedies of Creditors

1. Where the sole devisee of a testator qualifies as administratrix of the estate and, before the expiration of the two years for settlement of the estate, executes a deed of trust on the land devised to secure notes alleged to have been given to procure the withdrawal of caveat proceedings, the deed of trust is not absolutely void, C. S., 76, but is good as between the parties for what interest the devisee has in the land, and the *cestui que* trust has the legal right to have the trust deed foreclosed according to its terms, subject to the right of the creditors of the estate to have the title divested if the estate is insolvent, and the creditors may not enjoin the foreclosure proceedings upon equitable grounds. *Bank v. Zollicoffer*, 620.

EXPERT TESTIMONY see Evidence K.

FALSE PRETENSE (Issuing worthless check see Bills and Notes I f; variance between charge of obtaining goods by means of worthless check and proof of issuing worthless check see Indictment E c 2).

A Elements and Nature of Crime and Grounds for Civil Relief.

a Intent to Defraud

1. In order to convict a defendant under the provisions of C. S., 4283, for obtaining property in return for a worthless check, the indictment must sufficiently charge an intent to cheat or defraud or that the defendant obtained a thing of value, chapter 14, Public Laws of 1925, which is ineffectual, and chapter 62, Public Laws of 1927, not being in effect at the time of the alleged offense, are not considered. *S. v. Horton*, 771.

b Deception and Damage

1. A conviction under C. S., 4277, for false and fraudulent representations as to the quantity of standing timber on land sold to the prosecutor cannot be sustained where the amount of the purchase price for land is to be determined by the number of feet of timber cut therefrom, the prosecutor not being damaged thereby; nor can the conviction be sustained for misrepresentations as to the quality of the trees when the prosecutor had ample opportunity to inspect them and had been urged to do so by the defendant. *S. v. Crouse*, 209.

FEDERAL EMPLOYERS' LIABILITY ACT see Master and Servant E.

FENCES see Indictment E c 1.

FIXTURES (Fixtures subject to mortgage lien see Mortgages C a 1).

A Determination as to Whether Affixed Chattels Pass with the Realty.

a As Between Vendor and Purchaser

1. Where a husband gives a deed to certain lands to his wife, the question of whether affixed chattels pass with the realty is determined as between vendor and purchaser, and where prior to the deed the husband places a cotton gin and corn mill in an outhouse on the land and uses them for his own crops and for profit for those of neighbors, applying the doctrine of fixtures, the gin and corn mill pass to the wife under the deed and are subject to her disposition by will and not the will of her husband. *Jenkins v. Floyd*, 470.

FLIGHT—as evidence of guilt see Criminal Law G g.

FORFEITURES see Intoxicating Liquor F.

FRAUD (Fraudulent conveyances see Fraudulent Conveyances; cancellation of instruments for, see Cancellation of Instruments A b; setting aside judgment for, see Judgments K c).

A Deception Constituting Fraud and Liability Therefor.

a Intent to Deceive

1. Knowledge and intent to deceive are essential elements of actionable fraud, and where a real estate agent makes representations as to the character of construction of a house he is offering for sale without knowledge of their falsity, the purchaser may not maintain an action for damages for fraud and deceit, his remedy being, upon a proper showing of mutual mistake, for a rescission of the contract of purchase. *Ebbs v. Trust Co.*, 242.

FRAUDULENT CONVEYANCES.

A Determination of Whether Conveyance is Fraudulent and Invalid.

c Knowledge and Intent of Grantee

1. Where a husband induces his wife to join in a sufficient deed to their daughter conveying lands held by them in entirety with the purpose unknown to the wife and their grantee of defeating the levy under a judgment of his creditor, his judgment creditor then having no right of execution against the land cannot be defrauded of a right, and the wife and their grantee being free from fraudulent intent, the conveyance is not subject to be defeated on the ground that it was executed in fraud of the rights of his personal judgment creditor. *Winchester-Simmons Co. v. Cutler*, 709.

2. Where it appears in the complaint in an action to subject lands to a levy under a judgment against the husband alone that the husband and wife had held the lands by entireties and had conveyed a good and sufficient fee-simple title to their granddaughter by their joint conveyance, there is no sufficient allegation that their grantee took the title impressed by a trust. *Ibid.*

d Insolvency and Intent of Grantor

1. A debtor is not insolvent within the intent and meaning of the statute when his entire assets equal or exceed his entire indebtedness, and where a solvent debtor conveys practically all of his property to secure a preëxisting debt, having other creditors at the

FRAUDULENT CONVEYANCES A d—*Continued.*

time, it does not create a preference within the intent and meaning of C. S., 1611, nor is it in effect an assignment for the benefit of creditors requiring a filing of an inventory within the meaning of C. S., 1610, and judgment for defendants in an action to set aside such conveyance is proper, and *held further*, there was no sufficient evidence of intent to defraud creditors to warrant the submission of an issue thereon. *Flowers v. Chemical Co.*, 456.

GAME.

A Regulation of Hunting and Fishing.

a Power and Authority of Game Commission

1. The effect of the North Carolina Game Law is to make county game commission subordinate to the State Commission, the powers of the former being merely advisory or recommendatory until approved by the State Commission, and to this extent C. S., 2079-2086 are amended thereby. *S. v. Sizemore*, 687.

b Game Which May Not be Hunted Without License

1. Where foxes are defined as wild animals by a State Game Law, requiring a license to be charged for hunting wild animals, applying to a county that has no closed season for the hunting of foxes: *Held*, the license is required though as to the particular county the time is not restricted for the hunting of foxes. *S. v. Sizemore*, 687.

GAMING CONTRACTS see Contracts A h.

GIFTS.

A Gifts Intervivos.

c Operation, Effect and Power of Revocation

1. Where the grantor in a deed reserves a life estate to himself and conveys the remainder in fee to his son upon condition that at the grantor's death, or sooner at the grantee's option, the grantee pay to the two daughters and one granddaughter of the grantor the sum of five hundred dollars each, and the deed is registered and accepted by the grantee: *Held*, the condition for the payment of the stipulated sum operates as an absolute gift to the daughters and granddaughter which may not be revoked by the grantor, and upon the death of the granddaughter intestate during the lifetime of the grantor he may not dispose of her share by will, which should be paid to her administrator for distribution according to the canons of descent. *In re Peaden*, 486.

GUARDIAN AD LITEM see Insane Persons A a.

HEALTH see Cemeteries.

HIGHWAYS (Using profane language upon, see Profane Language; procedure to recover compensation for land taken for highway see Eminent Domain D a 4).

B Use of Highways and Law of the Road

f Proximate Cause and Intervening Negligence

1. Evidence tending to show that the plaintiff was being driven by her husband in his automobile and that the driver of the defendant's truck, in attempting to pass the car in which she was riding, sud-

HIGHWAYS B f—*Continued.*

denly and without warning drove his truck back to the right of the road in front of the car driven by the plaintiff's husband before the truck had completely passed the car, and that her husband, to avoid a collision with the truck drove his car off the road and hit a filling station, causing the injury in suit, is *held*, sufficient to take the case to the jury upon the question of whether the negligence of defendant's driver was the proximate cause of the injury or whether the husband of the plaintiff was guilty of intervening negligence relieving the defendant of liability. *Pridgen v. Produce Co.*, 560.

h Pleadings

1. Where, in an action to recover damages for a collision it is alleged that the collision resulted from the plaintiff's son, while driving in a careful manner, running into the defendant's truck which was negligently parked on the hard-surface portion of the highway, and that the injury was a result of the "wilful, wanton, careless and negligent conduct of the defendant," the allegations are sufficient to overrule defendant's demurrer thereto entered on the ground that the contributory negligence of the plaintiff's son was patent upon the face of the complaint. *Smithwick v. Pine Co.*, 431.

i Competency of Evidence in Actions for Negligent Driving

1. In an action to recover damages for personal injuries sustained by the plaintiff while riding in an automobile as a guest of the defendant, caused by the alleged negligent driving of the defendant, testimony that the plaintiff had cautioned the defendant about the manner of driving immediately preceding the accident is competent as evidence with other evidence tending to establish the fact of negligence. *Teasley v. Burwell*, 18.

j Nonsuit and Sufficiency of Evidence

1. Where, in an action to recover damages resulting from an automobile collision on a public highway, there is evidence tending to show that the plaintiff drove to the right to avoid hitting a hog on the highway and that as he brought the right wheels of his car again on the hard surface he was hit by the defendant's car which had struck the hog, and there is no directly affirmative evidence that the defendant's car was deflected by striking the hog and unavoidably hurled against the plaintiff's car, and there is evidence from which the jury might infer that the defendant had failed to keep a safe distance behind the plaintiff's car in violation of The Code of 1927, sec. 2621(57), or that he had not observed the statutory requirements in attempting to pass the plaintiff in violation of section 2621(54): *Held*, inconsistent inferences may be deduced from the evidence and the case should have been submitted to the jury for determination as to whether the injury resulted from conditions which could not have been foreseen or from the negligence of the defendant. *Hobbs v. Mann*, 532.

2. Where in an action for damages resulting from an automobile collision the evidence tends to show that the accident resulted from ice on a highway bridge and not from any negligence of the defendant, defendant's motion as of nonsuit is properly allowed. *Horton v. Ross*, 630.

HIGHWAYS—*Continued.*

C County Highways.

a Power of County Commissioners to Open, Abandon, etc.

1. Where the county commissioners have the statutory power to close and abandon a public county highway, the method prescribed by statute must be complied with, and in this case *held:* a resolution abandoning a road without giving notice and an opportunity to be heard was not a sufficient compliance with the statute. *Colvin v. Power Co.*, 353.

D Obstructing Highways.

a Wrongful Obstructions

1. An agreement by the board of county commissioners having authority to close a public road of a county that a power company might obstruct the road by ponding water thereon is not effective when the abandonment of the road by the commissioners has not been done in accordance with the statutory provisions, and the subsequent obstruction of the road by the power company is wrongful. *Colvin v. Power Co.*, 353.

d Right of Individual to Recover for wrongful Obstruction

1. Where the plaintiff's only means of ingress and egress to this land is destroyed by the wrongful obstruction of a highway he has suffered special damage differing not only in degree, but also in kind from that suffered by the community at large, and he is entitled to recover of the one wrongfully obstructing the road his damages resulting therefrom. *Colvin v. Power Co.*, 353.

HOLOGRAPHIC WILLS see Wills C d.

HOMICIDE.

D Assault with Intent to Kill.

a Elements of the Crime

1. In order for a conviction of crime under the provisions of C. S., 4214, there must be a charge and evidence thereon of five essential elements: an assault, the use of a deadly weapon, the intent to kill, infliction of serious injury, death not resulting, and *Held:* while an assault does not necessarily include a battery, where serious injury is inflicted a battery is necessarily implied. *S. v. Hefner*, 778.

b Evidence

1. Evidence that several defendants indicted under the provisions of C. S., 4214, were discovered selling liquor in violation of our prohibition law, and that they were armed with pistols and blackjacks and acted in concert, and that one of them threatened the life of the officer attempting to arrest them, and that the others participated by carrying the officer to a room of a garage where they beat him with a blackjack into unconsciousness, and carried him out into a field and left him there where later and alone he recovered consciousness, is sufficient for the conviction of them all of an assault with a deadly weapon with intent to kill, resulting in serious injury, in violation of the statute. *S. v. Hefner*, 778.

HOMICIDE D b—*Continued.*

2. Where the evidence against the defendants, tried under an indictment for violating C. S., 4214, tends to show an assault with a blackjack and other like instruments whereby they beat the one assaulted into unconsciousness and carried him into a field where alone he eventually recovered consciousness, is sufficient as to the use of a deadly weapon in making the assault. *Ibid.*

G Evidence.

a Weight and Sufficiency

1. Where upon a trial for murder there is evidence tending to show that the defendants, leaders of a strike, had conspired and unlawfully agreed among themselves to resist officers of the law to the death and shoot to kill in case their plans were interrupted, and that they had made threats against the officers and had gathered ammunition and guns at their union headquarters and had placed armed guards about the place, and that when officers arrested one of the guards and were taking him from the grounds of the union headquarters to the patrol wagon a number of shots were fired, wounding the union guard who had been arrested and each of the officers, one of them fatally, and that none of the strikers were wounded except the one arrested, and that empty shells were found in the union headquarters, with further evidence that the defendants had taken active part in forming the conspiracy and had participated in the actual shooting, with other evidence of defendants' guilt: *Held*, the evidence was sufficient to be submitted to the jury, and defendants' motion as of nonsuit was properly refused. *S. v. Beal*, 278.

c Dying Declarations

1. Declarations made by the deceased while sane, in *articulo mortis* or *in extremis*, in apprehension of approaching death, concerning the killing or matters going to make up a part of the *res gestæ*, are competent evidence upon the trial of the defendants for a conspiracy resulting in murder, and such declarations are not made incompetent as expressions of opinion from the fact that the defendants were not specifically mentioned, when it appears with certainty that they were the ones referred to; as in this case, "I do not know why they shot me in the back and killed me. I didn't do anything." *S. v. Beal*, 278.

HOSPITALS.

C Private Hospitals.

a Liability to Patients

1. Where the surgeon to perform an operation at a private hospital is selected by the plaintiff or by her personal physician with her or her husband's approval, the hospital in which the operation is to be performed agreeing to provide only the facilities for the operation, the hospital is not liable for the alleged negligence of the surgeon in the performance of the operation, and where in an action against the hospital the evidence fails to show that the surgeon was employed by the hospital or that the hospital selected or recommended the surgeon, a request for directed verdict that the plaintiff could not recover should be granted, and the fact that

HOSPITALS C a—*Continued.*

the surgeon was on the staff of the hospital or that he was a stockholder and officer of the hospital corporation does not vary the result. *Penland v. Hospital*, 314.

HUNTING see Game.

HUSBAND AND WIFE (Privileged communications see Evidence D e).

B Rights, Duties and Liabilities.

e Wife's Power to Execute Contracts

1. A married woman may now make executory contracts as binding as if she were a *feme sole*, C. S., 2507, with certain restrictions, C. S., 2515, and when she has executed a note as co-maker with her husband, a holder in due course for value, may accordingly enforce collection thereof against her as a person primarily liable on the note, and absolutely required to pay it. C. S., 2977. *Taft v. Covington*, 51.

g Husband's Liability for Funeral Expenses of Deceased Wife

1. The solvent husband of a deceased wife is primarily chargeable with the payment of her funeral expenses, and her separate estate is secondarily liable, and our statute permitting her to make an executory contract binding her separate estate does not change the common-law rule, although it gives her the power to make her estate primarily liable therefor by express agreement or intent to that effect. *Smith v. Smith*, 473.

2. Where a wife has executed a will which expresses her intent that her funeral expenses be paid out of her separate estate, the common-law rule that her husband is primarily liable therefor does not apply, and her separate estate is chargeable therewith, and where the solvent husband has paid them he may file and maintain a petition before the clerk of the court for the sale of her lands to make assets for their payment, the personal property being insufficient, and is entitled to be repaid from the proceeds the money he has thus advanced. *Ibid.*

D Wife's Separate Estate (Wife gets good title to note secured by husband's mortgage purchased with her separate estate see Mortgages E b 1).

d Conveyance of Separate Estate by Wife and Necessity of Husband's Joinder (see, also, Deeds and Conveyances A f)

1. There is no constitutional inhibition on the Legislature to declare by statute when and how a wife may become a free trader, and notwithstanding the provisions of Article X, section 6, to the effect that a married woman may convey her separate realty with the written consent of her husband, the provisions of C. S., 2530, making her a free trader upon the abandonment of her husband and authorizing her to convey her real estate without his consent, is valid, and in such cases, C. S., 2509, requiring the execution of her deed by her husband and her separate examination taken, does not apply. *Keys v. Tuten*, 368.

2. In order for a wife abandoned by her husband to become a free trader under C. S., 2530, it is not necessary that the wife be abandoned for the statutory time necessary to constitute grounds for

HUSBAND AND WIFE D d—*Continued.*

divorce, and where, in an action by her to set aside her deed executed without the written consent of her husband, the defense is set up that at the time of its execution she had been abandoned by her husband, and pleadings in her action for divorce alleging abandonment at the time are introduced in evidence: *Held*, the issue of abandonment should be submitted to the jury even though abandonment was not an issue in the divorce proceedings, and the granting of a judgment on the pleadings in her favor is error. *Ibid.*

F Actions.

a Parties, Joinder and Misjoinder (Personal representative of deceased husband necessary party in action on their contract see Contracts F a 1)

1. Where a civil action for damages is brought by a husband and wife for an alleged assault against them both, for alleged false arrest of the male plaintiff and abuse of process in swearing out a peace warrant against him and his false imprisonment, the defendant's demurrer on the ground of misjoinder of parties and causes of action is properly sustained and the case dismissed, the several causes of action not affecting all the parties to the action as required by C. S., 507, and C. S., 2513, authorizing a married woman to bring suit for damages for personal injuries without the joinder of her husband. *Sasser v. Bullard*, 562.

G Property (Estoppel by deed see Estoppel A a 1; wife's deed void without proper acknowledgment see Deeds and Conveyances A f).

a Estates by Entireties

1. In the absence of fraud which would vitiate their deed a conveyance of land executed and delivered by husband and wife to lands held by them in entirety conveys the entire title to the lands to their grantee not subject to execution under a judgment against only one of them. *Winchester-Simmons Co. v. Cutler*, 709.

2. During their joint lives the husband has only a possibility of acquiring the full title to lands held by them in entireties, and such interest is not subject to a lien by virtue of a judgment against him alone, and he may convey this interest that he has without imputation of fraud against his judgment creditor. *Ibid.*

IMPROVEMENTS—Right of life tenant to compensation for, see Life Estates B a.

INDICTMENT (Conviction of lesser degree of crime charged see Criminal Law I l, Burglary C f 1; sufficiency of indictment for rape see Rape C a).

C Motion to Quash or Dismiss and Demurrer.

a Grounds in General

1. A bill of particulars filed by order of court in a criminal action is not regarded as a part of the indictment, and with the court's permission may be amended at any time, and is not subject to demurrer, the office of such bill being to advise the court and the accused of specific occurrences for investigation. C. S., 4613. *S. v. Beal*, 278.

INDICTMENT C—*Continued.*

b For Duplicity

1. A motion to quash for duplicity and indefiniteness made after pleas of not guilty is addressed to the sound discretion of the trial judge and is not allowable as a matter of right. *S. v. Beal,* 278.

E Issues, Proof and Variance.

c Variance Between Indictment and Proof

1. Where in a criminal prosecution for the violation of C. S., 4317, providing that a person removing a fence surrounding "any yard, garden, cultivated field, or pasture" should be guilty of a misdemeanor, the indictment charges the defendant with having removed a fence surrounding a cultivated field, and the evidence is that the fence surrounded a pasture: *Held,* the words "pasture" and "cultivated field" are not synonymous and are distinguished in the statute by a disjunctive, and an instruction which charges that a pasture is a cultivated field within the meaning of the statute is erroneous. *S. v. Cornett,* 634.

2. Where an indictment in a criminal prosecution charges the defendant with having fraudulently obtained goods by means of a worthless check in violation of C. S., 4283, and the defendant is convicted of having uttered a worthless check in violation of chapter 62, Public Laws of 1927, the offenses are not the same, and there is a fatal variance between the indictment and proof, and the defendant's demurrer to the evidence will be sustained in the Supreme Court on appeal. C. S., 4643. *S. v. Martin,* 636.

INDEPENDENT CONTRACTORS see Master and Servant F f, D a.

INFANTS—Setting aside consent judgment of, see Judgments K a 1; duty of clerk in regard to funds of, see Clerks of Court B a 1.

INJUNCTIONS (Review of decrees in injunctive proceedings see Appeal and Error J a; enjoining tax levy see Taxation E b; enjoining use of land as cemetery see Cemeteries).

B Grounds for Injunctive Relief.

c Enforcement of Contract

1. Where it is made to appear that the plaintiff will be damaged in an unascertainable amount by the breach by his former employee of a valid contract not to engage in the same business in competition with the plaintiff within a restricted area for a reasonable time after the termination of the employment, sufficient grounds are shown for the granting of injunctive relief. *Moskin Bros. v. Swartzberg,* 539.

H Liabilities on Injunction Bonds.

a Measure of Recovery

1. Where a temporary order restraining the defendant from selling certain land under foreclosure proceedings has been continued to the final hearing upon the plaintiff filing bond as required by C. S., 854, and the injunction is finally dissolved, the measure of damages recoverable on the injunction bond is the loss sustained by the defendant by reason of the issuance of the restraining orders not exceeding the penal sum of the bond, which is ordinarily the

INJUNCTIONS H a—*Continued.*

depreciation, if any, in the value of the property from the date of the issuance of the injunction to the date of its dissolution, but if the value of the property at the date of the issuance of the injunction is insufficient to pay the amount of the debt secured by the mortgage, and there has been no depreciation in the value of the property, the measure of damages is the amount of interest on the debt accrued during the time the injunction is in force and not paid from the proceeds of the sale or otherwise. C. S., 854. *Gruber v. Eubanks*, 335.

b Pleading and Proof of Loss

1. Where an injunction restraining the defendant from selling certain land under foreclosure proceedings has been continued to the final hearing upon the plaintiff's filing bond, and at the hearing the action is dismissed, upon the defendant's motion for judgment for damages sustained by reason of the issuance of the restraining orders, the defendant having filed a bill of particulars by order of court setting out the items of damages claimed by him: *Held*, the defendant is confined to the items set out in his bill of particulars and may not recover as a part of his damages the rental value of the lands when he has failed to include such rental value in his bill of particulars as an item of damage claimed by him. *Gruber v. Eubanks*, 335.

INSANE PERSONS.

I Actions.

a Appointment of Guardian Ad Litem

1. Where a party to an action has become insane and placed in a State institution therefor, and is thereafter released therefrom as sane, C. S., 6214, the court is without authority, after his regaining his sanity, to appoint a guardian *ad litem* for him, C. S., 451, and notice to the guardian so appointed as to the taking of depositions of witnesses does not comply with the required statutory notice, C. S., 1810, and upon objection, the depositions so taken should be excluded. *Orr v. Beachboard*, 276.

INSURANCE (Surety bonds see Principal and Surety B).

C Insurance Agents.

b Authority

1. A soliciting agent of an insurance company is without actual authority to receive for the insurer any money except for the first annual premium, and where a person knowing that such agent is solely a soliciting agent, pays to such agent several annual premiums upon his representations of increased benefits, and obtains a receipt on the company's form from the agent which recites that the sum was for the first annual premium, and the insured knew that the sum paid by her was in excess of the first annual premium: *Held*, the insured was put on notice that the agent had authority to receive only the first annual premium, and by the exercise of due care would have ascertained the limited authority of the agent, and the act of the agent in receiving several annual premiums was beyond the real or apparent scope of his authority, and upon the

INSURANCE C b—*Continued.*

agent's failure to turn in the application for the policy and the money to the company, and its failure to issue the policy, the plaintiff can recover only the amount of the first annual premium from the company. *Thompson v. Assurance Society*, 59.

2. An agent of an insurance company having authority to collect premiums for the company cannot accept anything but money therefor, but this principle does not apply to the facts of this case where the agent was without actual or apparent authority to collect any amount in excess of the first annual premium, and the bonds collected by him were in payment of subsequent premiums. *Ibid.*

E The Contract in General.

b Construction and Operation and Conditions and Covenants in General

1. Where the meaning of the language of a policy of insurance is ambiguous all doubt should be construed against the insurer, but where the terms of the policy are free from uncertainty there is no necessity for construction, and it is the duty of the courts to enforce such contracts as they are written unless fraud, public policy, or maintainable equities should intervene. *Jolly v. Ins. Co.*, 269.

2. A provision in a policy of life insurance that the insurer would not be liable except for the return of the premium paid in case the insured died from apoplexy within one year from the date of the issuance of the policy is valid and enforceable in the insurer's favor, C. S., 6460, not being applicable to the facts of this case. *Gilmore v. Ins. Co.*, 632.

d Reinstatement of Policy

1. Where no definite time is fixed by a policy of life insurance in which the insurer is to act upon the insured's application for reinstatement of the policy, upon a forfeiture of the policy for nonpayment of premiums and the insured's applying for reinstatement of the policy according to its provisions, it is the duty of the insurer to pass upon the application for reinstatement within a reasonable time, not arbitrarily, but upon reasonable grounds in the exercise of reasonable prudence and diligence. *Trust Co. v. Insurance Co.*, 465.

2. A provision in a policy of life insurance whereby the insurer agrees to reinstate the policy after it has become forfeited for nonpayment of premiums upon certain conditions, gives a substantial right to the insured, and where the insured makes application for reinstatement to the general agent of the insurer who issues a conditional receipt for the amount required for reinstatement upon the back of which the insured is advised that if he fails to hear from the insurer within sixty days "notify the company at the home office": *Held*, there is no definite time fixed within which the insurer is to act upon the application for reinstatement, and where the insurer has not acted thereon sixty-two days after the application, upon the death of the insured and demand by the beneficiary for payment of the policy an issue of fact is raised for the determination of the jury as to whether the insurer failed to act thereon within a reasonable time. *Ibid.*

INSURANCE—*Continued.*

J Forfeiture of Policy for Breach of Promissory Warranty, Covenant or Condition Subsequent.

a For Violation of Stipulations and Covenants in General

1. Where under a policy of fire insurance providing for a forfeiture if any foreclosure proceedings under mortgage or deed of trust be commenced against the premises with the knowledge of the insured, foreclosure proceedings are instituted without the direct knowledge of the insured, who hearing of the advertisement of the premises for foreclosure from a third person settles with the mortgagee and has the proceedings abandoned, and thereafter loss by fire is sustained during the life of the policy: *Held*, under a reasonable construction of the provisions of the policy, a forfeiture will not be declared, the insured having no direct knowledge of the foreclosure proceedings, and the loss occurring after the settlement with the mortgagee the risk under the policy was not affected at the time of the loss by the violation of the provision, and the policy was revived upon the discontinuance of the violation. *Landreth v. Assurance Co.*, 181.

b For Nonpayment of Premiums

1. In construing a contract of life insurance the law will avoid a forfeiture for nonpayment of premiums when this can be done by reasonable construction, but a forfeiture will be enforced if plainly incurred by the terms of the policy unless there is an express or implied waiver by the insurer. *Trust Co. v. Ins. Co.*, 465.

c For Failure to Give Notice of Disability

1. Where a clause in a policy of life insurance provides for a waiver of premiums and the payment to the insured of a certain amount of money monthly in case of permanent and total disability upon due notice and proof of such disability to be given the insurer before the time for the payment of the next premium after the beginning of the disability, failure to give such notice within the time specified will not work a forfeiture if the insured is under such disability as to incapacitate him from giving such notice, and his failure is not attributable to any fault of his. *Rhyne v. Ins. Co.*, 419.

2. Where a policy of life insurance contains a clause waiving the payment of premiums and providing for the payment to the insured of a certain amount of money monthly upon receipt from the insured and acceptance by the company of due proof that the insured has become totally and permanently disabled: *Held,* where the insured has become mentally incapable of furnishing such proof or having it furnished for him, and is without fault, his failure to give immediate written notice will not work a forfeiture, and where such proof is furnished more than a year after the beginning of the disability by the insured's son upon his discovery of the policy, the insurer is liable for the amount of the monthly disability payments from the time of the disability to the death of the insured and for a premium paid on the policy after the beginning of such disability; and *held further*, evidence of the insured's incapacity to give such notice was sufficient to go to the jury in this case. *Nelson v. Insurance Co.*, 443.

INSURANCE—*Continued.*

K Estoppel, Waiver, or Agreements Affecting Right to Declare Forfeiture.

a Knowledge of Violation of or Agreements Waiving Conditions Operating as Waiver or Estoppel

1. Knowledge of the agent writing a policy of life insurance of the physical condition of the applicant is imputed to the insurer and the insurer may not avoid the policy upon the ground of false representations in regard thereto. *Marsh v. Ins. Co.*, 341.

2. Where, upon the death of the insured, a fraternal insurance lodge delivered by its secretary its check in payment of a policy to the beneficiary, and in his presence the beneficiary endorses it over to the undertaker in payment of services rendered by him in burying the deceased insured, and the difference in cash is paid by the undertaker, and the insurer stops payment of the check at the bank upon the ground that the insured was over the age allowed by the insurer's constitution: *Held*, the knowledge of the secretary of the insurer of the age of the insured at the time of the transactions will estop the insurer from maintaining as against the undertaker acquiring the check for full value that the policy was void for fraudulent representations as to the age of the insured in her application for the policy, and in an action by the undertaker on the check a directed verdict in his favor is proper, and *held further*, the receipt by the insurer of premiums from the insured for seven years without questioning her age indicated negligence. *Lightner v. Knights of King Solomon*, 525.

c Waiver by Failure to Declare Forfeiture

1. Where an application for reinstatement of a policy of insurance has been made according to the provisions of the policy, it is the duty of the insurer to act thereon within a reasonable time, and where it fails to so act it will be held to have waived the right to declare the policy forfeited, and under the facts of this case the question of whether the insurer failed to act within a reasonable time is for the determination of the jury. *Trust Co. v. Insurance Co.*, 465.

M Proof of Death or Loss.

d Burden of Proof

1. In order to recover upon a policy of casualty insurance providing for liability if the insured should be killed by a motor-driven vehicle while walking or standing on a public highway, the burden of proof is on the plaintiff to show by evidence the liability of the defendant according to the terms of his policy, and evidence that the insured was found dead on the public streets of a city, with bruises on his body, etc., is insufficient to overcome defendant's motion as of nonsuit. *Jones v. Casualty Co.*, 772.

N Persons Entitled to Proceeds.

a Upon Death of Beneficiary of War Risk Insurance

1. Under the amendment to the War Risk Insurance Act, which is retroactive as well as prospective in effect, upon the death of the beneficiary named in the policy the proceeds are to be distributed according to the canons of descent as of the death of the insured. and where the insured soldier dies leaving him surviving his mother, the beneficiary in the policy, and a brother and sister.

INSURANCE N a—*Continued.*

upon the death of the mother the brother and sister are entitled to the monthly payments under the policy as statutory beneficiaries, and upon the death of the sister her children are entitled to the cash value of the payments due her as her heirs at law to the exclusion of the brother of the insured, who is entitled only to the monthly payments due him under the policy. *In re Estate of Pruden*, 256; *In re Estate of Pruden*, 666.

Q Life Insurance.

b Double Indemnity and Construction of Policy as to Risks Covered Thereby

1. Where the double indemnity clause of a policy of life insurance expressly and clearly excludes from the operation of the clause death resulting from bodily injury inflicted by a third person, the incontestable clause of the policy does not operate to increase the risks covered therein, and the beneficiary of such policy cannot maintain that the incontestable clause withdraws from the insurer the right to contest the payment of the double indemnity, the effect of the incontestable clause being to preclude the insurer from questioning the validity of the contract at its inception, and to prevent it from maintaining that the policy thereafter became invalid by reason of a condition broken. *Jolley v. Ins. Co.*, 269.

S Property Damage Insurance.

a Construction of Contract as to Risks Covered

1. Where in an action on a policy of insurance covering loss to property from windstorms there is evidence tending to show that a windstorm was the dominant, efficient cause of the loss, but that snow was a contributing cause, the evidence is properly submitted to the jury, it being ordinarily sufficient if the cause designated in the policy is the dominant, efficient cause of the loss. *Miller v. Ins. Co.*, 594.

INTEREST (Usury see Usury.)

A Time and Computation.

a Interest on Amount Recovered by Judgment

1. Where in an action on a policy of insurance covering loss to property from windstorms the verdict of the jury does not award interest either as such or as a part of the damages, the judgment should award interest from the date of the verdict and not from the date of the destruction of the property by the cause designated in the policy, and where the judgment awards interest from the latter date the cause will be modified and affirmed. *Miller v. Ins. Co.*, 594.

INTERSTATE COMMERCE see Taxation A h.

INSTRUCTIONS see Trial E.

INTOXICATING LIQUOR (Intoxication as affecting capacity to commit crime see Criminal Law B a).

D Transportation.

a Evidence

1. Where in a prosecution for possession and transporting intoxicating liquor, the evidence tends only to show that the defendant went

INTOXICATING LIQUOR D a—*Continued.*

with one storing intoxicating liquor in the barn of another, whom he had never seen before, in order to show him the way at the latter's request; that the liquor was afterwards found there by prohibition officers, without further evidence to connect the defendant with the violation of the law of transporting intoxicating liquor and having it in his possession for the purpose of sale, it is not sufficient evidence of guilt to go to the jury, and the defendant's motion as of nonsuit, C. S., 4643, should have been granted. *S. v. Johnson*, 429.

F Forfeitures.

a Rights of Lienors and Purchasers after Seizure and Sale

1. One claiming a lien under an unregistered mortgage on an automobile seized and sold under the provisions of section 3411(f), Michie Code, 1927, after notice by publication required by the statute may not successfully maintain his action for possession of the car against the purchaser at the sale had in conformity with law, though he may not have been aware of the proceedings and had no knowledge of the unlawful use of the automobile at the time of its seizure. *C. I. T. Corp. v. Burgess*, 23.

2. Michie's Code of 1927, sec. 3411(f) expressly transfers the lien upon an automobile seized and sold for the unlawful transportation of liquor to the proceeds of the sale, and does not deprive the lienor of his property in conflict with Constitution of North Carolina, Art. I, sec. 17, or with the Due Process Clause of the Federal Constitution, the statute prescribing notice by publication, and the mode of giving notice being peculiarly a legislative function. *Ibid.*

ISSUES see Trial F.

JEOPARDY see Criminal Law F.

JUDGES.

A Powers and Duties.

b Special Judges

Where a special judge has been authorized under commission of the Governor to hold a term of court in only one county of a district, he may not issue an order for alimony, attorney's fees and costs in a proceeding in an action for divorce *a vinculo*, continued to be heard before a judge regularly holding the terms of court in that district and this being determinative of the appeal the question is not presented as to whether it was required that the appellant should make it appear by the Governor's commission, or otherwise, that the regular judge assigned was unable to attend and hold courts, etc. Chapter 137, Public Laws of 1929, sec. 5, Art. IV, secs. 10 and 11, Constitution of North Carolina. *Reid v. Reid*, 740.

JUDGMENTS (Execution see Execution; interest on, see Interest A a).

F On Trial of Issues.

d Motion for Judgment Non Obstante Veredicto

1. Where the pleadings are sufficient to support the verdict, a motion for judgment *non obstante veredicto* will not be allowed, and where the trial depends upon whether an agreement respecting the de-

JUDGMENTS F d—*Continued.*

fendant's liability had been made between the parties, and the verdict thereon is rendered in favor of the plaintiff, the defendant's motion for judgment *non obstante veredicto* on the ground of failure of consideration will not be allowed when the extent of his plea by way of answer is only the denial of the fact of agreement as alleged in the complaint. *Iron Works v. Beaman*, 537.

K Attack and Setting Aside.

a Consent Judgments

1. A judgment by consent, signed and entered by the court upon the agreement of the next friend bringing the action for a minor, where there is no legal determination by the court of the matter in controversy, no evidence introduced and no issues submitted to a jury, may be impeached in an action brought by the minor after becoming of age in which it is presented as a defense. *Keller v. Furniture Co.*, 413.

b For Surprise and Excusable Neglect

1. An attorney who has obtained a license to practice law from the Supreme Court has a right to practice in the courts of all the counties of the State, and where a client has employed a licensed, reputable attorney of good standing, residing in one county to defend him in an action pending in another county, and has put him in possession of the facts constituting the defense, and the attorney has prepared and properly filed an answer: *Held*, upon a judgment being obtained for the negligent failure of the attorney to appear and defend the cause when called for trial, the defendant may have the judgment set aside for surprise and excusable neglect upon his motion aptly made, the negligence of the attorney not being imputed to the client, and the latter being without fault. *Sutherland v. McLean*, 345.

2. Where a judgment has been obtained against a defendant for failure to appear and defend an action when it was called for trial, a finding of a meritorious defense is not necessary in order to set aside the judgment for surprise and excusable neglect when the defendant has filed an answer in the cause alleging facts which, if believed, would constitute a meritorious defense, it appearing to the appellate court that the allegations of the answer were sufficient. *Ibid.*

3. In order to have a judgment by default set aside on the ground of excusable neglect and irregularity the movant must show a meritorious defense, and where such defense is not made to appear an order granting a motion therefor will be vacated on appeal and the cause remanded. *Woody v. Privett*, 378.

c For Fraud

1. Equity will not ordinarily set aside a judgment for intrinsic fraud in the trial of the action, such as false swearing, conspiracy to defraud, etc., since such matters relate to the issues joined in the trial and should have been met in the trial by the use of such diligence as is required of a defendant, but a judgment may be set aside only for extrinsic fraud or fraud relating to matters which are not in issue and which prevent the defendant from presenting

JUDGMENTS K c—*Continued.*

his defense and which prevent a real contest in the trial in which the judgment sought to be vacated was rendered. *McCoy v. Justice*, 602.

2. Where in a suit to set aside a judgment obtained against the defendant for criminal conversation and the alienation of the affections of the plaintiff's wife, the allegation and proof are that the husband and wife and others conspired together to conceal the fact that the husband and wife continued to live together and that he continued to support her until the action at law had terminated contrary to the evidence in that case, with other evidence of false swearing: *Held*, the allegations and evidence are to intrinsic fraud for which equity will not set aside a judgment, and judgment as of nonsuit was properly entered. *Ibid.*

3. While pleadings in an action may be competent in proper instances upon another trial between the same parties to contradict the evidence introduced in the later action, its exclusion is immaterial and not reversible error when the later suit is in equity to set aside the judgment in the former action, and the pleadings are to matters constituting intrinsic fraud for which equity will not grant the relief demanded. *Ibid.*

4. Although the declarations of one of the parties to an unlawful conspiracy are ordinarily admissible against the other conspirators when made in furtherance of the common scheme, in a suit to set aside a judgment, the exclusion of a part of a deposition relating to a conspiracy between the former plaintiff and his wife to obtain money by bringing suit for alienation of the affections of the wife, is to an agreement to commit perjury and is to intrinsic fraud for which equity will not set aside a judgment, and *held further*, its exclusion was harmless, the substance of the excluded testimony being brought out on cross-examination. *Ibid.*

5. Newly discovered evidence is a ground for a motion for a new trial in an action at law, and will not be considered in a suit in equity to set aside a judgment for fraud, the newly discovered evidence being intrinsic to the issues involved in the action at law. *Ibid.*

d Procedure

1. Where it appears by record that the sheriff's return shows that a summons has been served on the defendant, and the defendant contends to the contrary that in fact it had not been served, the defendant's remedy is by motion in the cause, and when it appears of record that no summons has been served, his remedy is by independent action, and in such instances the judgment is subject to collateral attack. *Jordan v. McKenzie*, 750.

L Operation of Judgments as Bar to Subsequent Action. (Estoppel by record see Estoppel B a.)

a Judgments as of Nonsuit

1. Where, after judgment as of nonsuit, another action has been brought on the same cause of action within one year under the provisions of C. S., 415, and defendant moves for judgment as of nonsuit and excepts to the trial court's refusal of the motion, and on appeal the only question presented is whether the plaintiff had paid the

JUDGMENTS L a—*Continued.*

costs of the prior action as required by the statute: *Held,* the burden is upon the plaintiff to show compliance with the statute and where the record on appeal contains no evidence that the costs of the prior action had been paid, a directed verdict in the plaintiff's favor will be held erroneous, and it cannot be presumed that such evidence was properly before the jury from the fact that the trial court stated at the close of testimony that as he understood the evidence he would have to give a directed verdict that the costs had been paid, to which counsel did not object until after a verdict in the plaintiff's favor. *Southerland v. Crump,* 111.

2. Where an action upon a contract for the sale of defendant's lands by the plaintiff and the division of profits therefrom, is nonsuited because the evidence of fraud, bad faith and arbitrariness on the part of the defendant in refusing the offers procured by the plaintiff for the sale of the land in accordance with the contract, were not supported by allegation, the judgment as of nonsuit will not operate as a bar to a subsequent action brought within the statutory period on the same cause of action where the allegations are not substantially identical with those of the first, but the deficiency in the allegations of the first action are supplied therein and evidence introduced to support them, and the doctrine of *res judicata* does not apply. *Ingle v. Green,* 149.

3. A judgment as of nonsuit upon the merits of an action brought by the administratrix of an injured employee of a railroad company under the Federal Employers' Liability Act will not operate as a bar to the same cause brought under the laws of this State, C. S., 3466, 3467, the law and facts applicable to the first not being identical with those applicable to the second. *Fuquay v. R. R.,* 499.

b Matters Concluded or Which Should Have Been Adjudicated

1. Where the plaintiff brings action for breach of a contract whereby the defendants, as partners, were to furnish land and the plaintiff to cultivate crops thereon, alleging that he was ejected therefrom during the cultivation of the crop, a judgment obtained by one of the defendants against the present plaintiff in an action in ejectment before a justice of the peace will operate to estop the plaintiff, the issues in the ejectment action being as to whether the present plaintiff had breached the same contract sued on by failing to cultivate the crops, and the fact that the action in ejectment was brought by only one of the present defendants does not destroy the identity of parties necessary to an estoppel, especially where the present plaintiff failed to demur in the ejectment action for defect of parties. *Savage v. McGlawhorn,* 427.

2. A former judgment involving the same controverted title to lands between the parties under whom the plaintiffs and defendants claim title to the *locus in quo* may be introduced in evidence by the plaintiff as an estoppel without pleading an estoppel by judgment, although when relied upon as a defense it must be pleaded. *Thorpe v. Parker,* 451.

3. Parol evidence is admissible to show identity of contract adjudicated when not inconsistent with record. *Savage v. McGlawhorn,* 427.

JUDGMENTS—*Continued.*

Q Life of Judgments.

a Attachment of Judgment Lien and Date from Which Time is Computed

1. Where the judgment against the defendant provides that it should be a lien on and collectible only out of the amount due the defendant out of the estate of her grandfather, it is a final judgment, and the lien of the judgment immediately attaches to the interest specified and is enforceable against the same, by execution, and where the judgment is docketed in the county where the land comprising the estate of the grandfather is situate more than ten years after its rendition, action to enforce judgment is barred by the ten-year statute of limitations, and it may not be collected out of the share of the defendant of the proceeds of the sale of the estate. *Hughes v. Thomas,* 207.

JUDICIAL NOTICE see Evidence A.

JURY—Insanity of juror as grounds for mistrial see Criminal Law J b.

KINDERGARTEN SCHOOLS see Schools and School Districts E b.

LABORERS' AND MATERIALMEN'S LIENS (Mechanics' Liens see Mechanics' Liens).

A Nature, Grounds and Subject-Matter.

a Contractual Relation Between Principal Contractor and Owner

1. The right of laborers and materialmen to a lien upon a building is exclusively statutory, and the statute does not give a right of lien upon a lot where the principal contractor is not the owner and does not have any contractual relationship with the owner, and where by mistake a building is erected on the lands of another who has not contracted therefor or agreed thereto, the laborers and material furnishers have no statutory right of lien against him, and this result is not affected by the fact that the present owner of the title to the *locus in quo* acquired with knowledge of the facts. *Honeycutt v. Kenilworth Development Co.,* 373.

C Operation and Effect and Liabilities.

b Amount and Extent of Lien of Materialmen and Subcontractors

1. A material furnisher for a building may not acquire a lien against the property or hold the owner liable when the owner has paid the contractor in full before receiving notice of the claim from the materialman. *Pearce-Young-Angel Co. v. Sternberg,* 21.

2. Where the owner of a building being erected pays according to the contract his contractor a sum of money in excess of the amount due a materialman after he has received notice, and later the contractor abandons his contract and the owner finishes the building at his loss, the materialman's lien attaches to the building as an obligation of the owner under the provisions of our statute. *Hardware Co. v. Burtner,* 743.

3. Where the material furnisher for a building files his notice of claim, C. S., 2470, the lien against the building of the owner relates back to the time the delivery was completed, and action must be commenced within six months after the filing of the above notice

LABORERS' AND MATERIALMEN'S LIENS C b—*Continued.*

(C. S., 2444, not applying), and in that event the lien is preserved from the furnishing of the material and is superior to a deed of trust registered since that time, and where the evidence is conflicting the question is for the jury under proper instructions from the court. *Supply Co. v. McCurry,* 799.

LACHES see Cancellation and Rescission of Instruments B c.

LANDLORD AND TENANT (Lessee's liability for injury caused by negligent construction by it of addition to leased premises see Negligence A c 3; liability of mortgagee in possession for rent see Mortgages B a; agricultural liens see Agriculture D b).

B Leases in General.

b Construction and Operation of Covenants

1. Where under a written contract the lessee installs a heating plant in the leased premises whereby the lessor agrees to pay him the amount he paid therefor at the expiration of the lease, and accordingly the lessee makes demand for this exact amount, which is not disputed, further stipulations in the lease contract that the parties shall agree upon the cost of the heating plant "and place the same in writing" is not prerequisite to the lessee's right of recovery in his action for the actual cost of the plant. *Drug Co. v. Helms,* 755.

D Terms for Years.

d Termination or Cancellation Under Terms of Contract

1. Where a lease contract provides that the term of the lease should be for a period of five years subject to termination by the lessor at the expiration of any yearly period upon thirty days written notice, and for cancellation of the contract for condition broken, in an action in ejectment the granting of defendant's motion as of nonsuit for that there was no allegation or evidence tending to show a breach of condition by the lessee for which the lease could be canceled, is error, there being evidence that the defendant entered into possession under the lease contract and that the plaintiff gave the notice required to terminate the lease at the expiration of a yearly period according to its terms. *Texas Co. v. Fuel Co.,* 492.

2. Where, in an action on a lease contract providing that the lease should terminate if the premises were destroyed or rendered unfit for use and occupancy by fire, the evidence discloses that the lessor, upon the happening of a fire in the building, immediately notified the lessee that he would make the necessary repairs, and made the repairs and tendered the premises to the lessee within five days after the lessee had surrendered the keys, and there is conflicting evidence as to whether the premises were damaged by the fire to such an extent as to render them unfit for use and occupancy: *Held,* an instruction that a building is rendered unfit for occupancy when it is damaged to such an extent that it is unfit for carrying on the business of the lessee and cannot be restored to a fit condition without unreasonable interruption of the business, is correct, and the lessee's exception thereto cannot be sustained. *Basketeria Stores, Inc. v. Shelton,* 746.

LAW OF THE CASE see Appeal and Error I b.

LIBEL AND SLANDER.

D Actions.

c Evidence

1. In an action to recover damages for slandering a female when the words sued on are ambiguous, the complaint must allege that the words spoken of and concerning the plaintiff implied immorality in order to admit testimony of witnesses as to their understanding of the intent of the words actually spoken, the wrongful intent being denied both in the answer and in testimony of defendant as a witness. *Hurley v. Lovett*, 793.

LICENSE TAXES see Taxation B c, Game.

LICENSEE—Duty of owner of land in regard to, see Negligence A c 1, 2, Railroads C c.

LIENS see Mortgages, Chattel Mortgages, Agriculture A, Laborers' and Materialmen's Liens, Mechanics' Liens.

LIFE ESTATES.

B Rights and Liabilities of Life Tenant as to Remaindermen.

a Improvements

1. One who makes permanent improvements on an estate knowing at the time that she owns only a life estate therein, may not maintain her suit against the remaindermen to recover a proportionate part of the value of the improvements upon the ground that the improvements were for the benefit of their remaindermen, and the cost of such improvements are chargeable to the life tenant alone. *Smith v. Suitt*, 5.

b Waste

1. In an action to recover for waste against a life tenant it is required that the remainderman have a good and not a doubtful title, and where the plaintiff in an action therefor claims as heir at law of the grantor who had conveyed the property to B. for life, then to B.'s children, the title of the plaintiff depends upon the death of B. without children, and he cannot maintain the action. C. S., 888. *Batten v. Corp. Com.*, 460.

C Sale of Estate for Reinvestment.

a Procedure

1. A tenant for life in lands may not by adversary proceedings against the remaindermen compel the sale of lands for partition of the proceeds, C. S., 3255, but upon a proper showing the sale for reinvestment may be ordered in equitable proceedings under the provisions of C. S., 1744. *Smith v. Suitt*, 5.

LIMITATION OF ACTIONS (Of actions to enforce street assessments see Municipal Corporations G d 1, 2, 3; on judgments see Judgments 2).

E Pleading, Evidence, and Trial.

c Necessity of Pleading Statute as Defense, and Burden of Proof

1. In an action to recover the statutory penalty for usury the two-year statute of limitations must be pleaded when relied on as a defense,

LIMITATION OF ACTIONS E c—*Continued.*

the clause relating thereto having been taken out of section 3836 of The Code and placed in the chapter relating to civil procedure, C. S., 442, and thereby made a statute of limitations, but when properly pleaded the burden is upon the plaintiff to prove that his suit is brought within two years from the time the cause of action accrued. *McNeill v. Suggs*, 477.

LOGS AND LOGGING see Deeds F a.

MANDAMUS.

A Nature and Ground for Writ.

b Compelling Performance of Legal Duty

1. Mandamus is to enforce the performance of a duty already owing by the defendant to the party seeking the writ, and the party to be coerced must be under legal duty to perform the act sought. *Bunn v. Maxwell*, 557.

2. Mandamus will not lie to control the exercise of discretion by a board, officer or court or of a judicial or *quasi*-judicial function, unless it clearly appears to the court that there has been an abuse of discretion, the function of the writ being to compel the performance of a ministerial or legal duty and not to establish a legal right. *Wilkinson v. Board of Education*, 669.

MASTER AND SERVANT.

C Master's Liability for Injuries to Servant.

b Tools, Machinery and Appliances, and Safe Place to Work

1. Where in an action to recover damages for a personal injury sustained by the plaintiff, the evidence tends only to show that the plaintiff's foot slipped upon a cross-tie while employed in loading a log upon a carriage operated on rails, causing the injury in suit: *Held*, a judgment as of nonsuit was properly entered under the general principle that an employer's duty to provide an employee a safe place to work does not apply to "ordinary, everyday conditions" readily observable, where there is no reason to suppose that injury would result. *Goddard v. Desk Co.*, 22.

2. The rule requiring an employer to exercise reasonable care to provide his employee a reasonably safe place to work does not apply where the employer does not have charge of or control over the premises and has no express or implied notice of the existence of unsafe conditions there, and where an employee is sent to the premises of a customer to repair an electrical switch-box it is the duty of the employee to inform the employer of any unsafe conditions or of the necessity of a helper to do the work when the work to be done is simple and it could not have been reasonably anticipated that such necessity would exist. *Crawford v. Michael & Bivens*, 224.

3. Where the evidence discloses that the employer ordered his employee to go upon the premises of a customer and repair an electrical switch-box, and that the premises were not under the control of the employer, and that the work to be done was simple, and that the employee did not inform his employer of any unsafe conditions there or of the necessity of a helper, although he could have easily

MASTER AND SERVANT C b—*Continued.*

done so by telephone: *Held*, the evidence fails to disclose any breach by the employer of his duty to exercise reasonable care to provide his employee a reasonably safe place to work and sufficient help for its performance, and defendant's motion as of nonsuit should have been granted. *Ibid.*

4. An employer is not liable in damages to his employee for unanticipated accidents or for failure to furnish an implement when it is purely speculative as to whether the injury would have occurred had it been furnished. *Crisp v. Lumber Co.*, 343.

5. Where in an action against an employer there is evidence tending to show that the plaintiff employee, after disengaging the clutch and stopping the drum in which hides were processed, was removing hides from the drum in the course of his duties, and that while so employed the clutch suddenly became engaged and the drum started revolving without any act on his part or those working with him, resulting in the injury in suit, and further that the clutch had not been inspected in two years, and that it became engaged because of defective oiling or because of clogged grease channels: *Held*, the doctrine of *res ipsa loquitur* applies, and the evidence is sufficient to be submitted to the jury and overrule defendant's motion as of nonsuit. *Eaker v. International Shoe Co.*, 379.

6. An employer is required in the exercise of ordinary care to furnish his employee a reasonably safe place to work and tools and appliances reasonably safe and suitable for the work and such as are approved and in general use, and to keep such tools and appliances in such condition in the exercise of due diligence, and where a disengaged clutch becomes engaged without the intervention of human agency, which would not happen if the machinery had been in proper condition, the doctrine of *res ipsa loquitur* applies. *Ibid.*

7. Evidence tending to show that the deceased was employed by the defendant to keep seed from choking steel tunnels in the defendant's seed house, and that the deceased was found dead in the bulk of seed, without evidence of a slide of seed precipitating the deceased into the tunnel, but to the contrary that the deceased's pitchfork was sticking up in the seed at the mouth of the tunnel after the accident, with testimony of a physician who examined the body that he could not tell whether the deceased died from heart failure or smothering, with further evidence that the seed house was properly constructed and the methods of work were approved and in general use, is *held:* insufficient to be submitted to the jury, and defendant's motion as of nonsuit was properly allowed. *Ivey v. Oil Co.*, 452.

8. Where the evidence tends only to show that the plaintiff was an experienced employee and that, in the course of his employment, he was loading a dinky car with scrap iron to be conveyed from a railroad track to a furnace in which it was used, that he was furnished with a proper implement, that he himself selected the pieces of scrap for loading, and that, while examining a heavy piece of scrap to see if it was secure, another piece fell on him causing the injury in suit, that in performing this service he was

MASTER AND SERVANT C b—*Continued.*

left to his own manner and method, and there is no evidence of any act of his employer which was responsible for the injury: *Held,* defendant's motion as of nonsuit was properly granted. *Merritt v. Foundry,* 775.

9. Allegations of a complaint in a personal injury suit that an employee of defendant was injured while at work putting bottoms in chairs at a low bench with a clamp and screw driver, and that the injuries were caused by the employee's having to stoop over while at work, without allegation of defects in the appliances or proximate cause, are insufficient to state a cause of action, and the action will be dismissed on demurrer *ore tenus* or by the court *ex mero motu. Key v. Chair Co.,* 794.

c Methods of Work, Rules and Orders

1. Where all the evidence tends to show that an employee ordered to repair an electrical switch-box had had over two years experience as a worker on electrical apparatus, and that he readily undertook to do the work ordered: *Held,* the evidence fails to show any negligence of the employer in ordering the employee to repair the switch, and the employee cannot successfully maintain that he was inexperienced and incompetent to do such work, and upon failure of the evidence to show any negligence on the part of the employer his motion as of nonsuit should have been allowed. *Crawford v. Michael & Bivens,* 224.

2. In an employee's action to recover damages for an alleged negligent personal injury, evidence that plaintiff was acting under the direction of defendant's foreman with the latter's assurance that there was no danger, and was injured by a falling wall contiguous to a wall being torn down by them, is sufficient to carry the case to the jury on the issue of defendant's actionable negligence. *O'Neal v. Jones,* 652.

d Warning and Instructing Servant

1. Where an electrical contractor sends his employee to the premises of a customer to repair a switch-box, and the evidence tends to show that the employer warned and instructed the employee to cut off the electricity while working thereon, which the employee knew to be the safe method of doing the work from previous experience: *Held,* the employer having warned the employee of the only danger which the employer could have reasonably apprehended the employee would be exposed to, the evidence fails to show any breach of the employer's duty to warn and instruct his employee of the dangers incident to the work. *Crawford v. Michael & Bivens,* 224.

2. Where, in an action against a railroad company to recover damages for an alleged negligent personal injury, the evidence tends to show that the plaintiff had just been employed by the defendant; that he had never had experience in the work required of him, and that he was ordered, with other employees, to remove heavy rails from a car, requiring concert of action and an orderly method of work in order to avoid danger of injury, and that the defendant with the other workers had removed two rails from the car; that at the words "let's rise," they would lift the rail, walk about four

MASTER AND SERVANT C d—*Continued.*

feet, and at the words 'knock down rail" they would drop the rail to the ground, and that when the third rail was lifted they were ordered to "knock down rail" before it was carried any distance, and that the plaintiff, expecting that the rail was to be carried to the place where the others had been dropped, and not being warned or instructed, was injured by the rail falling on his foot: *Held*, sufficient to be submitted to the jury on the question of the defendant's negligence in failing to warn and instruct the plaintiff, the plaintiff having the right to assume that the third rail would be placed where the other two had been dropped. *Williams v. R. R.*, 767.

D Master's Liability for Injury to Third Persons.

a Independent Contractors

1. Where, in an action against an employer and the owner of a mill for injuries received by an employee in the construction of an addition thereto, the evidence discloses that the employer was an independent contractor, and that his foreman ordered the plaintiff employee to roll up a piece of wire connected to the wiring of the mill, and used for lighting the addition for the use of the workers, and that this lighting equipment was furnished by the owner, and that the employee, in attempting to remove the wire, was shocked and injured by reason of improper insulation, and that he had not been warned that the wire was charged with current: *Held*, the owner was under the duty to exercise reasonable care to see that the wire was properly insulated, and the contractor was under duty to exercise like care to see that in rolling the wire the employee was not unduly exposed to danger, but an instruction that between the owner and the employee there existed the relation of master and servant is reversible error to the owner's prejudice as depriving it of the defense to which it was entitled. *Peters v. Woolen Mills*, 753.

E Federal Employers' Liability Act.

a In What Cases the Act Applies

1. In an action in our State court by an employee for damages against a railroad company for an injury inflicted on him while engaged in interstate commerce, the defendant's liability is governed by the Federal Employers' Liability Act and the principles of the common law as applied in the Federal courts. *Cole v. R. R.*, 389; *Pyatt v. R. R.*, 397.

2. Where in an action in the State court against a railroad it is admitted that the plaintiff's intestate was engaged in interstate commerce at the time of his fatal injury, the liability of the defendant will be determined by the Federal Employers' Liability Act as construed and applied by the courts of the United States. *Wolfe v. R. R.*, 613.

b Nature, Grounds and Extent of Master's Liability Thereunder

1. In an action by an employee to recover damages from a railroad company under the provisions of the Federal Employers' Liability Act he must show such negligence on the part of the railroad company as would entitle him to go to the jury under the common law, and

MASTER AND SERVANT E b—*Continued.*

that such negligence was a proximate cause of the injury, the burden of proof being upon him as a matter of substance and not of procedure. *Cole v. R. R.*, 389.

2. While an employer is not an insurer of the safety of his employee, it is his duty to provide him, in the exercise of due care, a reasonably safe place to work and reasonably safe and suitable tools and appliances with which to do the work, and although the employer is not required to inspect simple tools which do not "import menace of injury," he is under duty, in the exercise of due care, to inspect such tools where the employee does not have the power of selection or the opportunity of inspection. *Ibid.*

3. Where in an action by an employee against a railroad company to recover damages for a personal injury under the Federal Employers' Liability Act, there is evidence tending to show that the plaintiff employee was ordered by the defendant company's foreman to repair a locomotive without placing the locomotive over a pit as was usual and customary in such cases, and that the employee was furnished a defective wrench and blade-setter with which to do the work, and that the employee was ignorant of the defect in the blade-setter, and that because of the cramped position in which he was forced to work he could not see such defect, and that the wrench slipped causing the injury in suit: *Held*, the evidence was sufficient to take the case to the jury upon the question of the defendant's actionable negligence. *Ibid.*

4. Although in order for an employee to recover against a railroad company under the Federal Employers' Liability Act, it is necessary that the plaintiff employee establish the defendant's negligence as the proximate cause of the injury, whether the act of the employee in placing a piece of iron pipe over the end of a defective wrench, furnished by the defendant, in order to obtain greater leverage, was an intervening cause is held a question for the jury under the facts of this case where the employee used slight force against the wrench and was forced to work in a cramped position on account of the defendant's failure to provide a pit ordinarily used for such repairs. *Ibid.*

5. An employee assumes the ordinary risks of his employment, but not such risks as are due to the negligence of the employer until the employee is aware of the negligent act and the risk arising therefrom unless the negligence and the risk are so obvious that a person of ordinary prudence in his position would have observed and appreciated them. *Ibid.*

6. Under the provisions of the Federal Employers' Liability Act the plaintiff employee must establish the negligence of the defendant railroad company, and no recovery can be had merely by proof of injury sustained by the employee while engaged in interstate commerce. *Pyatt v. R. R.*, 397.

7. Under the provisions of the Federal Employers' Liability Act contributory negligence of an employee will not be considered when the injury is a result of the violation by the defendant of any statute enacted for the safety of such employee. *Ibid.*

MASTER AND SERVANT E b—*Continued.*

8. An employee assumes the ordinary risk of his employment, but not such risks as are due to the negligence of the employer until the employee is aware of the negligent act and the risk arising therefrom, unless the negligence and the risk are so obvious that a person of ordinary prudence would have observed and appreciated them and quit the employment rather than incur them. *Ibid.*

9. Where, in an action by an employee against a railroad company to recover damages for a personal injury under the Federal Employers' Liability Act, there is evidence tending to show that the plaintiff employee was ordered by the carrier's *alter ego*, in helping to remove a worn rail from the track, to strike and loosen the rail at one end, and that the plaintiff, after striking several blows with a hammer furnished by the defendant, stepped over between the rails to see if all spikes had been removed, and that at this moment the foreman and another worker loosened the rail with crow-bars, causing it to hit and injure the plaintiff, and that the plaintiff was not warned, as was the custom, that the rail was going to be moved by crow-bars, is *held*, under the provisions of the Federal Employers' Liability Act, sufficient to be submitted to the jury on the question of negligence, contributory negligence and assumption of risks. *Ibid.*

10. Where in an action under the Federal Employers' Liability Act the evidence discloses that the plaintiff's intestate was an experienced switchman, and was applying brakes to cars which had been shunted by the defendant's shifting engine, and that before the cars upon which he was riding had been stopped they were hit by other cars shunted on the same track for the purpose of making up a train, and that the force of the impact knocked the plaintiff's intestate off the cars and killed him, with further evidence disclosing without contradiction that the shifting was done in the usual way according to the customary method, and there is no evidence of any unusual jerking or unexpected movement of cars, or that defendant's employees knew or had reason to believe that plaintiff's intestate was oblivious to the usual hazards is *held:* insufficient to take the case to the jury, and judgment as of nonsuit was properly entered. *Wolfe v. R. R.*, 613.

F Workmen's Compensation Act.

a Nature and Extent of Master's Liability Thereunder in General

1. The Workmen's Compensation Act is to be construed liberally to effectuate the broad intent of the act to provide compensation for employees sustaining an injury arising out of and in the course of the employment, and no technical or strained construction should be given to defeat this purpose. *Johnson v. Hosiery Co.*, 38.

2. The various provisions of the Workmen's Compensation Act are to be construed in their relations to each other as a whole to effectuate the intent of the Legislature to provide compensation to an employee for injury arising out of and in the course of his employment. *Rice v. Panel Co.*, 154.

3. The provisions of the Workmen's Compensation Act are to be liberally construed to effectuate the legislative intent as gathered from

MASTER AND SERVANT F a—*Continued.*

the act to award compensation for the injury or death of an employee arising out of and in the course of his employment, irrespective of the question of negligence. *Reeves v. Parker-Graham-Sexton, Inc.*, 236.

b Injuries Compensable Under the Act

1. In construing section 2(f) of the North Carolina Workmen's Compensation Act the words "arising out of the employment" in regard to injuries compensable is broad and comprehensive, and must be determined in the light and circumstances of each case, and the act, applying only to industries employing more than four workmen, contemplates the gathering together of workmen of varying characteristics, and the risks and hazards of such close contact, joking and pranks by the workmen, is an incident to the business and grow out of it, and is an ordinary risk assumed by the employer under the act. *Chambers v. Oil Co.*, 28.
2. Where there is evidence that the driver of the employer's oil truck habitually carried a pistol in order to protect his employer's property, and that the employer acquiesced therein, and that the plaintiff was injured while filling a fuel tank in the course of his employment by the accidental explosion of the pistol carried by the driver when the driver threw it back into his truck after he and the plaintiff had joked about whether the pistol would shoot: *Held*, the evidence discloses that the injury arose out of the employment and is sufficient to support the finding of fact by the Industrial Commission to that effect, which is conclusive and binding on appeal. Section 60, Workmen's Compensation Act. *Ibid.*
3. If an employee is injured as a result of the horse-play of a fellow-workman the injured employee is not precluded from recovering his damages under the Workmen's Compensation Act if he did not participate therein. *Ibid.*
4. The restriction of the Workmen's Compensation Act excluding injuries sustained in casual employment will not exclude an applicant under the provisions of the act when he sustains injuries in the course of the general trade, business, etc., of the employer and material or expedient therein, and the painting of the interior of a machine room to give the employees therein a better light or for the protection of the permanent structure is not a casual employment and is one in the general course of business, and the Workmen's Compensation Act applies to an injury received by a workman engaged in such painting. *Johnson v. Hosiery Co.*, 38.
5. Section 14(b) of the Workmen's Compensation Act providing that the act shall not apply to casual employees, is not totally repugnant to section 2(b) providing for compensation for an injury to an employee while "in the course of the trade, business," etc., and an employee is entitled to compensation even if the employment is casual if he is injured in the course of the trade, business, etc. *Ibid.*
6. Under the Federal Employers' Liability Act an employee not only assumes the ordinary risks of his employment, but also such risks as are due to the defendant's negligence when they are obviously known and appreciated by him. *Winfree v. R. R.*, 590.

MASTER AND SERVANT F b—*Continued.*

7. Where in an action under the Federal Employers' Liability Act there is evidence that the plaintiff's intestate chose to walk along the defendant's tracks, when he might have used a public street, that he was aware of the approach of defendant's train, that there were several places of safety along the track, and that he must have realized the danger, he is deemed to have assumed the risk of injury, and his administrator may not recover against the railroad on the ground that the intestate was struck by a northbound train on the southbound track, it not being shown that the defendant should have warned the intestate of the change in the schedule made necessary by repairs, and there being further evidence that the intestate knew or should have known of the change. *Ibid.*

8. In order for compensation to be recovered for the death of an employee under the Workmen's Compensation Act it is required that the injury causing death result from an accident arising out of and in the course of the employment, as a proximate cause: and where compensation is sought for the killing of one employee by another for purely personal and unrelated grounds, or when one was employed at night and the other by day, and the killing at night was a result of personal enmity alone, and these facts are found by the Commission and approved by the trial judge, the judgment denying the right of compensation will be affirmed on appeal. *Harden v. Furniture Co.*, 733.

9. The question of whether compensation is recoverable under the Workmen's Compensation Act depends upon whether the accident complained of arises out of and in the course of the employment of the one injured, and its determination depends largely upon the facts of each particular case as matters of fact and conclusions of law, and general definitions are unsatisfactory. *Ibid.*

f Independent Contractors

1. An independent contractor is one who is to complete the subject-matter of his contract under the terms thereof independently of direction or control of the other party to the contract as to the manner or method by which the work is to be accomplished, and where a person claiming compensation under the Workmen's Compensation Act is injured while doing work under the direction of the employer as the work progressed he may not be denied his claim upon the ground that he was an independent contractor at the time of his injury. *Johnson v. Hosiery Co.*, 38.

g Persons Entitled to Payment of Award

1. The common-law wife of a deceased employee is not entitled to compensation under the provisions of the Workmen's Compensation Act. *Reeves v. Parker-Graham-Sexton, Inc.*, 236.

2. Where the death of an employee is compensable under the provisions of the Workmen's Compensation Act, and such deceased employee has no dependents, the compensation is payable to his personal representative for the benefit of his heirs under the provisions of the act. *Ibid.*

MASTER AND SERVANT F—*Continued.*

h Amount of Compensation Recoverable Thereunder

1. Section 29 of the Workmen's Compensation Act allowing compensation to a workman for total temporary disability should be construed in *pari materia* with section 31 thereof allowing compensation for the loss of members, and so construed it is *held:* that where an employee has suffered an injury to his hand arising out of and in the course of his employment, and the injury causes him total temporary disability in the course of its healing, and renders it necessary to amputate certain parts of certain fingers of the hand, he is entitled to receive compensation under section 29 for total temporary disability, and in addition thereto compensation for the loss of the parts of his fingers under section 31, there being no provision in the act that the later should preclude the former, compensation for the later to begin upon expiration of the compensation for the former. *Rice v. Panel Co.*, 154.

2. While there is no computed amount provided by section 40 of the Workmen's Compensation Act for payment to the personal representative of a deceased employee for death resulting from an injury compensable thereunder, the act provides the method by which such amount can be commuted, which is payable to the personal representative for the benefit of the heirs at law of the deceased employee. *Reeves v. Parker-Graham-Sexton, Inc.*, 236.

i Review of Judgment of Industrial Commission

1. The findings of fact by the Industrial Commission as to claims under the Workmen's Compensation Act are conclusive upon appeal, and its conclusions of law are persuasive authority. *Rice v. Panel Co.*, 154.

MATERIALMEN'S LIEN see Laborers' and Materialmen's Liens.

MECHANICS' LIENS.

A Nature of and Right to Lien.

b Possession of Property

1. Under the common law and the provisions of our statute, C. S., 2435, one who repairs personal property loses his lien thereon by voluntarily surrendering possession to the owner, but where an automobile has been repaired and the artisan or mechanic is induced to part with possession upon false and fraudulent representations made by the owner that his check for the payment of the repairs was good and that he had sufficient funds in the bank for its payment, and the mechanic relies thereon and surrenders possession of the car, he does not do so voluntarily and unconditionally within the intent and meaning of the statute, and the mechanic does not lose his lien for the value of the repairs done by him. *Reich v. Triplett*, 678.

2. Where in an action to enforce a mechanics' lien for repairs to an automobile the evidence tends to show that the owner obtained possession of the property by false and fraudulent representations, and that the defendant in possession of the property was a purchaser from the holder of a note secured by a prior chattel mortgage on the property, who had taken possession from the owner

MECHANICS' LIENS A b—*Continued.*

thereunder, and there is no evidence that the purchaser was a bona fide one for value without notice, the demurrer of the holder of the note and the purchaser from him is properly overruled. C. S., 567. *Ibid.*

MERITORIOUS DEFENSE see Judgments K b 2.

MINORS—Setting aside consent judgment of, see Judgments K a 1.

MISTRIAL see Criminal Law J.

MORTGAGES.

A Requisites and Validity.

d Right of Devisee to Convey Devised Property to Secure His Indebtedness

1. A mortgage given by a devisee on property devised to him by will is not void, but is liable to be set aside by creditors in case of the insolvency of the estate. *Bank v. Zollicoffer*, 620.

B Duties, Rights and Liabilities of Parties.

a Of Mortgagee in Possession

1. A mortgagee or trustee in possession of the mortgaged premises under an agreement to collect the rents and apply them to the mortgage debt is chargeable with the reasonable rental value of the property while in his possession if he is negligent in collecting the rents and managing the property. *McDonald v. Lingle*, 219.

C Construction and Operation.

a Property Subject to Mortgage Lien

1. Where personal property is sold under a conditional sales contract which is registered in the book of chattel mortgages, it does not change its character as personalty by being annexed to a building for the purpose of its use, and such property is not subject to the lien of a prior registered mortgage on the real property, and upon foreclosure of the mortgage on the realty, the purchaser at the foreclosure sale is not entitled to the personalty as against the holder of the conditional sales contract, and it will not avail the purchaser that the registration of the conditional sales contract was solely in the chattel mortgage book, and that he had no notice thereof from an inspection of the book of real estate mortgages. *Finance Co. v. Weaver*, 178.

c Lien and Priority; Registration

1. No notice, however full and formal, will supply the place of registration required by our statute, C. S., 3311, and a registered mortgage on lands constitutes a first lien on the mortgaged lands as against prior mortgages or equities which the registration books in the county in which the land lies does not disclose. *Duncan v. Gulley*, 552.

2. Where the owners in common and cultivators of agricultural lands as partners sell their interests in the lands to one of the partners upon his assumption in his deed of all encumbrances placed upon the land by the grantors and his agreement therein to pay off all partnership debts and save the grantors harmless, and subsequently the purchasing partner borrows money under a deed of trust on the

MORTGAGES C c—*Continued.*

property and pays off the prior registered encumbrances, but fails to pay all the outstanding partnership debts, and thereafter judgment is obtained by one of the partnership creditors, and the purchasing partner dies: *Held*, the deed of trust given by the deceased partner constitutes a first lien upon the land prior to the subsequently docketed judgment and the claim of the administratrix of the deceased partner of a prior lien for the amount for which the estate was liable for the unpaid partnership debts, there being no agreement in the deed to the deceased partner that the partnership debts should constitute a lien upon the land, and the equities arising among the members of the partnership are not presented for adjustment upon the present record. *Ibid.*

3. No notice, however full and formal, can replace the statutory notice of registration as against creditors or purchasers for value, C. S., 3311, and where a mortgage on lands is executed and delivered, but not registered until after the registration of a later executed mortgage, the prior registered mortgage is a first lien on the land, and it is not sufficient to change this result that the prior registered mortgage was marked upon its face "second mortgage." Nor can notice *aliunde* advantage the holder of the mortgage first executed. *Story v. Slade*, 596.

4. No notice, however full and formal, can replace the statutory notice of registration, C. S., 3311, and where a second mortgage is executed and delivered, but not registered until after the registration of a third mortgage, the mortgage third in execution is prior to the mortgage secondly executed and subsequently registered, and this result is not changed by the fact that the mortgage third in execution contained a reference immediately after the description that the lands were the same conveyed in a first and second deed of trust, and contained a warranty against encumbrances "except as above stated," the references being insufficient to show that the parties intended to recognize the prior instruments as superior liens. *Lawson v. Key*, 664.

e Conditions, Covenants and Notice

1. Where upon its face a negotiable note refers to a deed of trust securing it, a purchaser is put upon notice of the terms of the mortgage showing that the note was one of a series and providing for acceleration of maturity of all the notes upon default in the payment of any one of them. *Bank v. Trust Co.*, 582.

E Assignment or Sale of Notes Secured by Mortgage.

b Transfer and Title of Purchaser

1. Where the owner of a town lot and farm executes with his wife a first and second mortgage on the town lot to secure, first, his own several notes and, second, their joint note, and the wife purchases with her own money one of the notes secured by the first mortgage and transfers the note to the trustee in a deed of trust on the farm under an agreement that he was to collect the note and apply the proceeds to the satisfaction of the deed of trust: *Held*, the wife acquired by purchase the title to the note secured by the first mortgage, and her transferee acquired the right to collect the same and

MORTGAGES E b—*Continued.*

apply the proceeds under their agreement, and the holder of the second mortgage on the town lot had no right to set off the deficiency at the foreclosure sale of his mortgage against the rights of the wife's transferee. *Fertilizer Co. v. Smith*, 722.

H Foreclosure.

h Execution of Power of Sale

1. Where a mortgage conveyance expressly provides that the mortgagee should give written notice thirty days before exercising the power of sale contained therein, the provision must be strictly complied with to extinguish the equity of redemption. *Jessup v. Nixon*, 122.

2. It will be presumed that sale was made according to terms of mortgage. *Phipps v. Wyatt*, 727.

j Right of Mortgagee, Trustee, or Cestui Que Trust to Bid in Property

1. There is no fiduciary relationship between a trustor and *cestui que trust* in a deed of trust, and the *cestui que trust* has the right to bid in the property at the foreclosure sale under the terms of the deed of trust. *Phipps v. Wyatt*, 727.

l Disposition of Proceeds and Surplus

1. Where a deed of trust on lands secures several notes in a series payable at different dates, and provides for acceleration upon the failure to pay any note or interest when due, and the trust deed is foreclosed upon the failure to pay one of the notes at maturity, a holder of one of the prior notes by endorsement without recourse is not entitled to payment in full from the proceeds of the foreclosure sale, but only to a *pro rata* payment with the holders of the other mortgage notes. *Bank v. Trust Co.*, 582.

m Title and Rights of Purchaser at Sale

1. The law prima facie presumes the regularity of mortgage sales under power of sale, and where a registered mortgage provides that the trustee's deed upon foreclosure "shall be prima facie evidence" of due advertisement of the property, and the trustee's deed is regular upon its face, a purchaser from the purchaser at the foreclosure sale is not required, in the exercise of due care, to examine the manner of sale and the report of the trustee, and he will be held a bona fide purchaser without notice of alleged irregularities in the advertisement of the property, and *held further*, under the facts of this case, the trustor's contention that the purchaser at the sale bid a grossly inadequate price for the property cannot be sustained against the bona fide purchaser. *Phipps v. Wyatt*, 727.

o Resale

1. The supervisory powers given the clerks of the Superior Courts by C. S., 2591, apply to sales and resales under the power of sale contained in mortgages and deeds of trust and not to ordinary judicial sales, and the statute must be strictly complied with. *Redfern v. McGrady*, 128.

2. Where an advance bid is made for the resale of lands foreclosed under power of sale, it is the duty of the clerk upon receiving the deposit within the time prescribed to order a resale, and where

MORTGAGES H o—*Continued.*

such resale is made and no advance bid is made within ten days, to order the trustee or mortgagee to make conveyance to the purchaser upon his payment of the amount of his bid. *Ibid.*

3. Where the mortgagor of lands foreclosed under power of sale makes an advance bid within ten days from the date of the sale and makes the required deposit, and the clerk orders a resale, and the mortgagor becomes the last and highest bidder at the resale, and the trustee and *cestui que trust* give the mortgagor time within which to comply with the bid and the clerk does not issue an order for the trustee to make title to the purchaser in accordance with the mandatory provisions of the statute, and thereafter the trustee files a petition for the sale of the land: *Held*, upon the land failing to bring the amount of the mortgage debt at the sale ordered after the failure of the mortgagor to comply with his bid, the trustee and *cestui que trust* by treating the bid of the mortgagor as a nullity and by taking the matter out of the clerk's hands waived their lien on the amount deposited by the mortgagor for the resale, and the deposit in the clerk's hands is subject to attachment by the creditors of the mortgagor. *Ibid.*

p Setting Aside Sale for Irregularities

1. The heirs at law of a deceased mortgagor are not precluded in proper instances from bringing suit to redeem the mortgaged land on the ground that the sale was not made in compliance with the terms of the mortgage even though the estate of the mortgagor was insolvent at the time of the sale. *Jessup v. Nixon*, 122.

2. Where the trustee in a deed of trust proceeds to advertise and foreclose the land under the terms of the instrument, and upon request of the trustor, continues the sale from day to day for about a month in order to give the trustor time in which to raise the money to pay off the lien, and the trustor is present at the time of the first continuance of the sale and at the time of the actual sale, and made no objection thereto, and failed to raise the bid within ten days, C. S., 2591, and thereafter the purchaser at the sale transfers to a bona fide purchaser without notice: *Held*, the trustor is estopped as against the bona fide purchaser without notice to set up his claim to the land on the grounds of alleged irregularity in the foreclosure proceedings. *Phipps v. Wyatt*, 727.

MUNICIPAL CORPORATIONS (Exercise of power of eminent domain see Eminent Domain; statute enlarging boundaries of, see Statutes A a 1; venue of action against municipal officer see Venue A b 1).

B Powers and Functions in General.

d Private or Quasi-Public Powers

1. Where a city sells current to consumers outside the city and the amount of current so distributed is so small that it does not affect the necessity of enlarging the city power plant in order to furnish efficient service to its own citizens, the question of the city's power to sell the current to outside consumers has no determinative bearing on the question of the city's authority to enlarge the power plant, and authority to enlarge such plant is implied from the authority to construct and maintain it. *Mewborn v. Kinston*, 72.

MUNICIPAL CORPORATIONS—*Continued.*

G Public Improvements.

a Power of City to Make Improvements and Levy Assessments Therefor

1. The ownership by the city of a street is a prerequisite to the power of the city to levy an assessment for street improvements against abutting owners thereon, C. S., 2703, and where the plaintiff in an action to have the street assessments removed as a cloud upon his title alleges in his complaint that the strip of land along which the plaintiff's lands abut is owned by him and not by the city as a street, a demurrer, filed on the ground that the owner should have proceeded under C. S., ch. 56, by objecting to the assessment roll at the time, admits the private ownership of the property, and will not be sustained. *Efird v. Winston-Salem*, 33.

2. Where the plaintiff alleges a cause of action against a city for taking his lands and demands compensation therefor, a recovery of the damages would entitle the city to assess the remaining property of the plaintiff abutting the land condemned for street improvements. *Ibid.*

d Objections to, Appeal from, and Enforcement of Assessments

1. The lien given to a city against abutting owners for street improvements is a lien upon the particular land superior to all others, C. S., 2713, and is not chargeable or collectible from other property of the owner, C. S., 2716, and where the charter of the city creates the lien from the commencement of the improvement work, and provides that the improvement charges shall continue to be a lien upon the land until fully paid, the ten-year statute of limitations does not run against the city in favor of the owner or one claiming under him without notice of the lien so long as the lien continues by the nonpayment of the assessment lien so created. *Statesville v. Jenkins*, 159.

2. A statute which shortens the time within which an action may be brought must give a reasonable time for the enforcement of rights affected thereby, and chapter 331, Public Laws of 1929, (b) will not apply to bar a municipality's right to enforce assessments for street improvements, the liens for which had attached before its passage, the act failing to give a reasonable time for the enforcement of the assessments by the city. *Ibid.*

3. A local statute enacted for a particular municipality is intended to be exceptional and for the benefit of such municipality, and is not repealed by the enactment of a general statute, and the charter of a city providing that assessments for street improvements shall remain in full force and effect until fully paid, governs the liability of those assessed thereunder rather than general statutory provisions in regard thereto. *Ibid.*

E Torts of Municipal Corporations.

a Torts Committed in Exercise of Governmental or Private Function

1. Although a municipal corporation is not liable for the negligence of its employees in the discharge of a governmental function, it is liable for such negligence in the discharge of a private or *quasi-*

MUNICIPAL CORPORATIONS E a—*Continued.*

private function which is conferred not primarily or chiefly from considerations connected with the State at large, but for the private advantage of the community incorporated therein, but the rule that it is not liable for negligence in the discharge of a governmental function has an exception in the case of the proper maintenance and safe condition of its streets. *Hamilton v. Rocky Mount*, 504.

c Defects or Obstructions in Streets or Other Public Places

1. Where, in an action against a city to recover for a personal injury, the plaintiff alleges that the city owned its own power plant and transmission lines for the generation and distribution of current for its own use and for the use of individuals for profit, and that, through its employees, it had dug a ditch and was laying a cable in a street for conducting current for lighting the street, and that the cable was pulled along the ditch by a motor vehicle which caused the cable to rise up out of the ditch when pulled taut, and that the plaintiff was injured by the cable rising up out of the ditch when she was attempting to cross the street, and that there was no warning or notice that the street was in an unsafe condition: *Held*, a demurrer to the complaint on the ground that it appears therein that the city was discharging a governmental function is properly overruled, the liability of a city for injury caused by its negligent failure to properly maintain its streets and warn of danger in regard thereto being an exception to the rule that it is not liable for negligence in the discharge of a governmental function, and the decision of the question of whether in the instant case the city was discharging a private or governmental function is unnecessary. *Hamilton v. Rocky Mount*, 504.

H Police Powers and Regulations.

b Zoning Ordinances

1. While the operation of a filling station is not a nuisance *per se*, it may become so, and an incorporated town has in the exercise of its police power, C. S., 2673, 2787, the authority to regulate by ordinance the operation of gasoline filling stations within its limits when such power is not exercised arbitrarily or with unjust discrimination in violation of rights guaranteed by the State and Federal Constitutions, and *held:* where the main residential section of an incorporated town is on one side of a railroad track running through its center, and the main business section is on the other side of the track, an ordinance excluding the operation of filling stations in its exclusive residential section is valid, its provisions applying equally to all persons similarly situated, and the ordinance applies to a curb gasoline pump within the excluded area. *Wake Forest v. Medlin*, 83.

K Fiscal Management and Taxation.

a Power to Incur Indebtedness

1. Where a city has acquired for municipal purposes an electric power and light plant after submitting the question to its voters according to the provisions of its charter, the corresponding authority is

MUNICIPAL CORPORATIONS K a—*Continued.*

implied, nothing else appearing, to maintain the plant in such a reasonable manner as might be necessary to guarantee at all times efficiency of service and the protection of the citizens and property of the community, and the question of an enlargement of the plant to meet these requirements to be paid for out of the profits of the plant, is not necessary to be likewise submitted to the voters of the city, the provision of the charter requiring the submission to the voters referring only to the initial acquisition of the plant. As to whether the charter could limit the vote to the "qualified taxpaying voters," *quære? Mewborn v. Kinston*, 72.

c Sinking Funds

1. While sinking funds provided for the retirement of municipal bonds may not be diverted from that purpose to other municipal requirements by a city, Constitution, Art. II, sec. 30, C. S., 2969(s), a sum erroneously placed on the books of the city in a sinking fund by a clerk without authorization, which sum was actually derived from profits from the municipal electric plant, does not fall within the constitutional or statutory inhibitions, and the city may by ordinance correct the error of the clerk and use the funds for other lawful municipal purposes. *Mewborn v. Kinston*, 72.

d Taxation, and Property Subject Thereto by City

1. The lien for taxation attaches annually to realty prior to the thirtieth of June under the general law in effect in 1929, and where the boundaries of a city are extended under an act providing that the date of the annexation be deferred until the thirtieth of June, 1929, the property so annexed is not within the city on the date that the lien for taxation attaches, and such property is not subject to an *ad valorem* tax levied by the city for the year of 1929. *Reynolds v. Asheville*, 212; *Nixon v. Asheville*, 217; *Gilkey v. Asheville*, 218.

2. Where under provision of statute the boundaries of a city are enlarged to include an entire incorporated town whose charter is thereby repealed, and the city assumes all of the outstanding obligations of the town and succeeds to all of its assets, revenues, taxes, assessments, etc., the obligations of the town are not extinguished by the repeal of its charter, and under constitutional mandate the means for their enforcement must not be impaired, and the city assuming the burden thereof is entitled to all the remedies of the town then available for enforcing its outstanding engagements, and where the property of a resident of the town has been listed for taxation during May preceding the town's annexation in June, and the property owner has paid no taxes to the town for the year for which his property was thus listed, the city annexing such town and succeeding to its tax list has the power to levy an *ad valorem* tax on the property, and the levy is not objectionable on the ground that the property was not within the boundaries of the city when the situs of the property was fixed for the ensuing year. *Green v. Asheville*, 516; *Pressley v. Asheville*, 520; *Jarrett v. Asheville*, 521.

MURDER see Homicide.

NEGLIGENCE (On highways see Highways B; of employer see Master and Servant C, of physicians see Physicians and Surgeons C, of hospitals see Hospitals C, of railroads see Railroads D, of cities see Municipal Corporations E, of street railroads see Street Railroads).

A Acts or Omissions Constituting Negligence.

c Condition and Use of Land or Buildings

1. A license to enter upon the lands of the owner implies permission given, and is more than mere sufferance, while an invitation implies solicitation, desire or request of the owner, and therein the rule affecting the owner's liability for injuries to an invitee while on the premises is more rigid than in the case of a trespasser or mere licensee, and the owner or occupant is required to exercise reasonable care for the safety of an invitee, although he is not an insurer. *Jones v. R. R.*, 1.

2. The general rule that the owner or occupant of land is not liable for a personal injury received by a licensee upon his premises caused by defects, obstructions or pitfalls upon the premises, unless the injury is caused by wilful and wanton negligence, is subject to the modification that if the owner knows of the habitual use of his land as a pathway and does some act to increase the hazard or danger without warning the licensee, causing injury without fault of the licensee, the owner or occupant of the land may be held liable as in case of ordinary negligence. *Ibid.*

3. Where the owner of land erects a filling station thereon according to specifications of an oil company, and upon its completion leases it to the oil company under a lease giving the oil company full direction and control of the premises, and the lessee makes an agreement with another for the operation of the station, and constructs an addition thereto in a negligent manner so that the vent pipe from the gasoline storage tank discharges fumes therefrom into the addition, resulting in injury to the plaintiff from an explosion occurring from the ignition of the fumes from his lighted cigar when he entered the addition: *Held*, the sole duty of the one operating the station for the lessee being to sell gasoline and oil for the lessee, and the lessee retaining full direction and control of the station, the operator was a mere licensee of the lessee, and the lessee is liable in damages proximately caused by the construction of the addition to the filling station in such negligent manner. *Rushing v. Texas Co.*, 173.

4. Where the lessee of a filling station through its agent in charge has customarily permitted its male customers to use the ladies' rest room and smoke therein, and by reason of its negligent construction, a male customer is injured by the explosion of gas fumes ignited by his lighted cigar, contributory negligence of the customer in his action for damages will not be held as a matter of law upon the defendant's motion as of nonsuit on the evidence. *Ibid.*

B Proximate Cause.

c Intervening Negligence

1. Where a driver negligently turns back to the right before having fully passed a car on the highway, subjecting the driver of the car in which the plaintiff is riding to imminent peril, the plaintiff's

NEGLIGENCE B c—*Continued.*

driver will not be held to the same deliberation or circumspection as he would in ordinary circumstances, and in this case his driving off the road and hitting a filling station is held not to constitute intervening negligence as a matter of law, which would insulate the negligence of the defendant, and relieve him from liability. *Pridgen v. Produce Co.*, 560.

2. Where independent negligence of third party is sole proximate cause of injury the defendant is not liable. *Chambers v. R. R.*, 682.

C Contributory Negligence.

d Burden of Proof

1. In an action to recover damages for an alleged negligent personal injury the burden is upon the defendant to prove contributory negligence when relied upon by him. C. S., 523. *Butner v. R. R.*, 695.

D Actions for Negligent Injury.

b Evidence

1. In this action to recover damages for an alleged negligent personal injury evidence is held competent as tending to show that the plaintiff's injury affected his ability to perform physical labor and to earn money. *Keller v. Furniture Co.*, 413.

c Nonsuit

1. Where there is evidence that a customer of a gasoline filling station is injured by the negligence of the defendant, the defendant's motion as of nonsuit is properly denied, the evidence of plaintiff's contributory negligence as a matter of law being insufficient to bar his recovery. *Rushing v. Texas Co.*, 173.

2. Where evidence of causal relation between negligence and injury is insufficient, nonsuit is proper. *Smith v. Wharton*, 246; *Winfree v. R. R.*, 590.

3. Where the doctrine of *res ipsa loquitur* applies in an action to recover for a negligent injury it is sufficient to take the issue of negligence to the jury and sustain an affirmative answer, but the burden of proof on the issue remains on the plaintiff. *Eaker v. International Shoe Co.*, 379.

4. Where evidence shows that intervening negligence was sole proximate cause of injury, nonsuit is proper. *Chambers v. R. R.*, 682.

5. Ordinarily, the question of whether the plaintiff is guilty of contributory negligence is to be determined by the jury, and it is only when a clear case of contributory negligence has been made out by the evidence that defendant's motion as of nonsuit on that ground should be allowed. *Butner v. R. R.*, 695.

NEW TRIAL see Criminal Law J; plea of former jeopardy upon, see Criminal Law F.

NON OBSTANTE VEREDICTO see Judgments F d.

NONSUIT see Trial D.

NUISANCE see Cemeteries.

OBSCENITY see Profane Language.

OFFICERS—Bonds of public, see Principal and Surety.

PAROL EVIDENCE see Evidence J.

PARTIES (Parties necessary in action of contract see Contracts F a 1; misjoinder in action by husband and wife see Husband and Wife F a).

B Parties Defendant. (Guardian *ad litem* see Insane Persons A a.)

b Who May or Must be Joined

1. Where in an action against the receiver of an insolvent corporation on an executory contract the plaintiff alleges that there was no contractual relation between it and the purchaser from the receiver of the property which was the subject-matter of the contract, and the purchaser is made a party on motion of the receiver who alleges that the purchaser is solely liable to the plaintiff: *Held*, judgment sustaining the demurrer of the purchaser is not error. *Lamson Co. v. Morehead*, 164.

2. Under our Code procedure the pleadings are to be liberally construed, and all necessary and proper parties having a community of interest in the subject-matter of the litigation may be brought in as parties by order of court when reasonably apparent that such is necessary to a final and conclusive judgment, and in this case *held* the demurrer of a party thus brought in was properly overruled. C. S., 456, 460. *Mack Truck Corp. v. Trust Co.*, 203.

PARTNERSHIP.

A The Relation.

c Evidence of Partnership

1. While one of the principles by which a partnership relation is determined is the sharing of the profits of an enterprise, a partnership is not established where the division of profits is looked to only as a measure for the compensation for services, and where the evidence tends to show only that the alleged partner exchanged notes with the one conducting a brokerage business for his accommodation, under an agreement for the mutual cancellation of the notes upon their maturity and for the payment of a share of the profits above a certain sum as compensation for certain services, and the payment of checks for a part of the profits in accordance with the agreement: *Held*, the evidence does not conclusively show a partnership and the refusal of a directed verdict on the issue is not error, the question being for the determination of the jury from the evidence. *Martin v. Bush*, 93.

PHYSICIANS AND SURGEONS.

C Rights, Duties and Liabilities to Patient. (Hospital's liability see Hospitals C a.)

b Malpractice or Negligence

1. Where in an action to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of the defendant physician in performing an operation on her, there must be sufficient evidence of a causal relation between the alleged acts of negligence and the injury, and where the evidence viewed in the

PHYSICIANS AND SURGEONS C b—*Continued.*

light most favorable to the plaintiff fails to show that the alleged acts of negligence of the defendant, in failing to exercise due care to make an adequate examination of the deceased before the operation, and his alleged negligence in leaving her before she recovered from the effects of the anæsthetic without providing a nurse, were a proximate cause of the death of the intestate, the defendant's motion for judgment as of nonsuit is properly allowed. *Smith v. Wharton*, 246.

PLEADINGS (Process see Process; judgment on pleadings see Husband and Wife D d 2; admissibility of pleadings in evidence see Evidence L a; in proceedings for sale of life estate for reinvestment see Life Estates C a 1; in criminal cases see Indictment).

A The Complaint.

c *Amendment*

1. As to whether a party to an action be allowed to amend his pleadings is ordinarily a question directed to the discretion of the trial judge and not reviewable on appeal. *Rockingham v. Coley*, 745.

D Demurrer. (For misjoinder of parties in action on contract see Contracts F a 1.)

a *Cause of Action*

1. Where a complaint includes a statement of a good cause of action among others that are not good a demurrer thereto is properly overruled. *Smith v. Suitt*, 5.

2. A demurrer to the complaint challenges the right of the plaintiff to maintain his action in any view of the matter, admitting for the purpose the truth of the allegations. *Efird v. Winston-Salem*, 33.

3. Upon a demurrer the pleadings are liberally construed in the light most favorable to the pleader, and where there are conflicting allegations, and one of them is sufficient to allege a cause of action, a demurrer thereto will not be sustained. C. S., 535. *Smithwick v. Pine Co.*, 431.

c *Speaking Demurrer*

1. Where, in an action against a city to recover for a personal injury, the defendant interposes a demurrer on the ground that the complaint discloses that the injury was inflicted by the city in the discharge of a governmental function for which it could not be held liable, and the demurrer is sustained, and thereafter the plaintiff files an amended complaint stating a good cause of action, and the defendant interposes a demurrer thereto on the ground that the plaintiff was estopped by the judgment on the first demurrer: *Held*, the second demurrer, depending upon matters outside the pleading, is bad as a speaking demurrer, and defendant's motion for dismissal on the ground that the plaintiff was concluded by the former judgment and his offer to read the former pleadings is in effect a demurrer *ore tenus* which is allowed only after the filing of a formal demurrer and can be considered only in its relation to the pleading to which the formal demurrer is addressed, except when filed for want of jurisdiction or that the complaint fails to state a cause of action. *Hamilton v. Rocky Mount*, 504.

PLEADINGS—*Continued.*

F Bill of Particulars.

a Motions for and Right thereto

1. A motion for a bill of particulars is addressed to the inherent general power of the trial court to regulate the conduct of trials, and when fairly exercised is not appealable. *Carteret County v. Construction Corp.*, 485.

POLICE POWER see Municipal Corporations H.

PONDING WATER—On highway see Highways D a 1.

PRESUMPTIONS—On appeal see Appeal and Error J e; of death see Evidence G c 1.

PRINCIPAL AND AGENT (Insurance agents see Insurance C; agents of corporations see Corporations G c).

C Rights and Liabilities as to Third Persons.

b Powers of Agent

1. Where the act of an agent is beyond the actual and apparent scope of his authority, the principal is not bound or liable to third persons therefor, and the principle that where one of two innocent persons must suffer for the wrong of another, the one who first reposes confidence in the wrongdoer must suffer the loss does not apply in such cases, nor will the principal be bound as in case of a secret limitation in the absence of some act in ratification or knowingly receiving the benefits of the contract. *Thompson v. Assurance Society*, 59.

2. A person who deals with an agent whose authority is known by him to be limited must inquire as to the extent of the agent's authority if he would hold the principal liable for the act of the agent. *Ibid.*

PRINCIPAL AND SURETY (Sureties on notes see Bills and Notes D b).

B Nature and Extent of Liability on Surety Bonds.

a Bonds for Private Construction

1. Where a contractor for the erection of a building sublets the painting thereof under a contract providing for payment to the subcontractor as the work progresses, reserving a balance until the completion of the work, upon the default of the subcontractor and the completion of the work by the contractor who had failed to retain the specified percentage: *Held*, the surety on the subcontractor's bond is discharged and relieved upon equitable principles of his liability on the bond to the extent of his actual loss occasioned by the failure of the contractor to retain the required percentage and no further, the surety being entitled to the retained percentage if it had been forced to complete the contract under the terms of the bond, and upon such facts a judgment sustaining the surety's demurrer on the theory that the surety was released, will be reversed in order that the rights of the parties may be determined. *Crouse v. Stanley*, 186; *Supply Co. v. Board of Education*, 575.

b Bonds for Public Construction

1. Where a contractor for the building of a public road with the State Highway Commission agrees in his contract to become liable to the Commission for all labor and material required to complete

PRINCIPAL AND SURETY B b—*Continued.*

the work, and the surety on the contractor's bond therein obligates itself to pay all sums "for which the contractor is liable," the contract and the indemnity bond will be construed together to ascertain the intent of the parties, and the expression "for which the contractor is liable" includes within the liability of the surety the payment of labor done or material furnished subcontractors of the contractor, such subcontracts being usual in work of this character, and the contract should be liberally construed. C. S., 3846(v). *Overman v. Indemnity Co.*, 736.

c Bonds of Public Officers and Agents

1. Where the treasurer of a county embezzles funds of a bank of which he is cashier and uses them to cover his embezzlement of county funds by paying a lawful obligation of the county therewith, the bank may trace and recover its funds thus purloined, and the surety on the bond of the county treasurer is liable for the deficit thus created in the county funds. *Wood v. Bank*, 371.

2. The statutory bonds required to be given by a sheriff, C. S., 3930, may be put in evidence as though they had been written as prescribed by statute, C. S., 324, and where suit is brought on one of the bonds which provides for liability if the sheriff fail to properly execute and return all process, or properly pay all moneys received by him by virtue of any process, "and in all things well and truly and faithfully execute the said office of sheriff," the general provisions of the bond as to the sheriff's faithful performance of the duties of the office relate to the specific obligations therein set out as to service and return of process, and neither the sheriff nor the sureties on his bond is liable thereon in a civil action for damages for a negligent injury inflicted by a prisoner lawfully intrusted to the custody of the sheriff while such prisoner was unlawfully permitted by the sheriff to be at large as a trusty. *Sutton v. Williams*, 546.

PROCESS.

B Service.

d Service of Foreign Corporations through Secretary of State

1. A summons served on the Secretary of State for a foreign corporation that at the time had no property in the State and was not doing business herein is a nullity, and upon motion before the clerk of the county wherein judgment against such corporation had been obtained by default, the judgment is properly set aside. C. S., 1137. *White v. Lumber Co.*, 410.

g Proof of Service

1. A summons returned by the sheriff showing service is prima facie evidence that it had been served, but it is not conclusive, and the contrary may be shown by clear and unequivocal evidence. *Jordan v. McKenzie*, 750.

PROFANE LANGUAGE.

A Elements of Offense of Using Profane Language on Highway.

b Public Highway

1. Where an owner has plotted his lands into lots with dividing streets and has sold some of the lots, there is a dedication to the public

PROFANE LANGUAGE A b—*Continued.*

use as between the parties, and where in a prosecution for using profane or indecent language upon a public highway in the hearing of one or more persons, the evidence tends to show that the defendant used profane language in the hearing of others on a street so dedicated, that the street had several houses thereon and that the adjacent owners had worked the street and that it had been used by the public for a period of ten or more years, the evidence that the highway was public within the meaning of the statute is sufficient to be submitted to the jury and sustain a verdict of guilty. *S. v. Burke,* 458.

RAILROADS (Liability of, to employees see Master and Servant E b;—as carriers see Carriers).

C Right of Way.

c Licensees and Trespassers

1. Where a railroad company knowingly permits the use of a pathway across its tracks by pedestrians for years without objection, and then fills in the track with dirt so as to make pitfalls where the pathway crosses the track, and a pedestrian in attempting to cross the track in the usual way stumbles in the loose dirt and falls and is injured: *Held,* the fact that such pedestrian was a licensee of the company at the time does not prevent his recovering damages resulting from the active negligence of the railroad company in increasing the hazard. *Jones v. R. R.,* 1.

D Operation.

b Accidents at Crossings

1. Where, in an action against a railroad company to recover damages sustained by the plaintiff in a collision between her automobile and defendant's train at a grade crossing of a much used street of a town, there is evidence tending to show that the defendant did not ring a bell or blow a whistle as the train approached the crossing, that the watchman employed by the defendant was standing some distance from the crossing with his signal hanging by his side, and failed to warn the plaintiff before she started across the track, is *held* sufficient to be submitted to the jury and overrule defendant's motion as of nonsuit. *Thurston v. R. R.,* 496.

2. Where, in an action to recover damages sustained in a collision between plaintiff's automobile and defendant's train at a grade crossing, there is evidence tending to show that the plaintiff slowed down her automobile to a speed not exceeding five miles per hour and looked and listened before attempting to cross the tracks, and that she saw defendant's watchman some distance from the crossing standing with his back to her, and that as the front wheels of her car had passed over the first rail the watchman ran towards her crying "stop," that she stopped and attempted to back from the track when her engine stalled and was hit by the train, with further evidence that if the plaintiff had not stopped, but had gone on across the track the accident would not have occurred: *Held,* the evidence of plaintiff's contributory negligence is insufficient to bar her recovery as a matter of law, and the refusal of defendant's motion as of nonsuit was proper. *Ibid.*

RAILROADS D b—*Continued.*

3. In an action for damages against a railroad company for the negligent killing of plaintiff's intestate, struck by defendant's train as he was endeavoring to cross defendant's tracks at a grade crossing in a city, evidence tending to show that the train approached without warning and that the intestate stopped, looked and listened before going on the track and was prevented from seeing the approaching train by a string of box cars on another of defendant's tracks, is sufficient to resist defendant's motion as of nonsuit upon the issue of contributory negligence. *Scoggins v. R. R.*, 631.

4. Where in an action against a railroad company and the driver of an automobile the evidence tends to show that the engineer of the defendant's train failed to give any warning of his approach to a public crossing in a city, and that the driver of the automobile approached the crossing at an excessive rate of speed, that he could have seen and heard the train before reaching the crossing, but that he did not slacken his speed, and that he hit the plaintiff's intestate who was standing on the sidewalk and knocked him under the train, resulting in death: *Held*, the negligence of the driver was the sole proximate cause of the injury insulating the negligence of the railroad company, and they may not be held as joint *tort-feasors*, and the demurrer of the railroad company was properly allowed. *Chambers v. R. R.*, 682.

5. Where the evidence in an action for damages against a railroad company tends to show that the plaintiff, upon approaching the defendant's grade crossing with a State highway in an incorporated town, brought his automobile practically to a stop, and looked and listened for an approaching train, that fog prevented him from seeing further than the length of his car, but there was nothing to prevent his hearing any warning of an approaching train, and that, seeing and hearing nothing, he drove upon the tracks and was struck and injured by the defendant's train which approached the crossing without giving any warning by bell or whistle, the evidence failing to disclose a situation in which the plaintiff would be required to get out of his car and make further investigation before going upon the tracks: *Held*, the question of the plaintiff's contributory negligence should have been submitted to the jury under the appropriate issue, and the granting of the defendant's motion as of nonsuit was error. *Butner v. R. R.*, 695.

6. In an action to recover damages sustained in a collision at a grade crossing, the fact that the plaintiff failed to stop as well as look and listen before attempting to drive his auto-truck across defendant's railroad track does not alone entitle the defendant to a verdict upon the usual issues of negligence, contributory negligence, etc., as other facts and circumstances may be considered and determined by the jury in plaintiff's favor. *Harris v. R. R.*, 798.

c Injuries to Persons on or near Track

1. A pedestrian voluntarily using the track of a railroad company as a walkway for his own convenience is required to look and listen for approaching trains and to use due care for his own safety, and where in an action by an administratrix it appears that the deceased was in full vigor and in possession of his faculties, and that

RAILROADS D c—*Continued.*

there was nothing in his condition to prevent him from seeing and hearing the defendant's train and getting off the track, the deceased's own negligence will bar a recovery by his administratrix. *Thompson v. R. R.*, 409.

2. Where, in an action against a railroad company for damages for the negligent killing of the plaintiff's intestate, the evidence tends to show that the intestate was employed as a watchman at a public crossing where the defendant had several tracks, that immediately after stopping work at night the plaintiff's intestate, instead of leaving by a street, assumed to walk up the defendant's tracks, and was killed by defendant's northbound passenger train running on the track for southbound trains, that the change in the use of the tracks was made necessary by condition of the track ahead, and that the train which struck the intestate had its headlight lit and gave all the usual warnings and signals, and that there were several places which the intestate could have reached and been in safety, is *held,* insufficient to establish the alleged negligence of the defendant in running its northbound train on its southbound track without notice to the intestate, as a proximate cause of the injury, and defendant's motion as of nonsuit was properly granted, there being no evidence that the defendant was under duty to warn the intestate of the change, and there being evidence that the intestate knew or should have known thereof. *Winfree v. R. R.*, 590.

3. A motion as of nonsuit upon the evidence is properly allowed when the evidence discloses that the plaintiff was walking upon the defendant's track without taking proper precautions for his own safety, and was struck and injured by the defendant's slowly backward moving train. *Dix v. R. R.*, 651.

RAPE.

C Prosecution and Punishment.

a Indictment

1. The refusal by the court of the defendant's motion in arrest of judgment on the ground that the indictment was fatally defective, made after verdict of guilty of the crime of rape, will not be held for error on appeal where the alleged defects are the failure of the indictment to describe the prosecutrix as a "female" and to allege that the crime was committed "by force," the indictment alleging that the defendant "with force and arms . . . in and upon C. . . . violently and feloniously did make an assault, and . . . violently and against her will," etc. *S. v. Johnson*, 321.

b Evidence

1. In a prosecution for rape where the prosecutrix positively identifies the defendant as the one who was guilty of the offense, there being ample evidence of the commission of the crime, and the defendant introduces contradictory evidence tending to prove an alibi, and the testimony of each is corroborated by other evidence, the credibility of the evidence is essentially for the jury, and under a trial free from error their verdict of guilty will be sustained on appeal. *S. v. Jackson*, 321.

RATIFICATION see Corporations G g.

RECEIVERS (Of corporations see Corporations H).

I Liabilities of Receiver and Surety.

a Procedure to Enforce Liability

1. After a receiver for a corporation has turned over all the corporation's assets to a trustee in bankruptcy later duly appointed, and has been discharged by the State court that appointed him, the remedy of the trustee in bankruptcy to recover from the receiver for misapplication of funds is by motion in the cause, and an independent action against the receiver, or others receiving benefits, or the surety on the receiver's bond, will not lie unless an order has been made vacating the discharge of the receiver. *Haas v. Cathey*, 796.

REFERENCE.

B Proceedings Before Referee.

c Evidence

1. The referee in passing upon the evidence of the value of certain property is not bound by the estimates of witnesses as to its value, but is at liberty to consider the situation of the property, its description and condition, and where evidence so considered supports his findings and the trial judge confirms them they are not reviewable on appeal. *McDonald v. Lingle*, 219.

C Report and Findings.

a Power of Court to Affirm, Modify, Set Aside and Re-refer

1. Where an action to set aside certain mortgages is referred to a referee and the referee allows the payment of a prior mortgage lien securing an amount due for legal services rendered the mortgagor out of the proceeds of the foreclosure sale, and the trial court confirms the allowance, in the absence of allegation and evidence tending to impeach the transaction, the action of the trial court will not be disturbed on appeal. *McDonald v. Lingle*, 219.

D Trial upon Exceptions to Report.

d Verdict and Matters Concluded Thereby

1. Where the referee's report is favorable to the appellant in one particular and he excepts to the report and the issue involving all his claims, including the particular found in his favor, is submitted to the jury and answered adversely to him, his motion to confirm the report is properly denied as being concluded by the general verdict. *Martin v. Bush*, 93.

REMAINDERMEN see Life Estates B a.

REMOVAL OF CAUSES.

D Amount in Controversy.

a Determination of Amount in Controversy

1. Upon a petition and bond for the removal of a cause from the State to the Federal Court on the ground that more than three thousand dollars is involved, the test is the value of the property of which the defendant may be deprived by the judgment demanded, and not the amount of the claim of the plaintiff, but where in an action on a disability clause in a life insurance policy the demand is for

REMOVAL OF CAUSES D a—*Continued.*

installments alleged to have already accrued thereunder, in an amount less than the jurisdictional limit, the petition for removal is properly denied, although the defendant may contest its liability for future installments in the present action. *Fields v. Ins. Co.*, 454.

RESCISSION—of instruments see Cancellation and Rescission of Instruments.

RES IPSA LOQUITUR see Negligence D c 3; Master and Servant C b 5.

RESTRAINT OF TRADE see Contracts A f.

RIOT.

A Nature and Elements of the Offense.

a Definition of the Offense

1. The offense of riot is composed of the three elements of unlawful assembly, intent to mutually assist against lawful authority, and acts of violence: and *Held*, the evidence in this case plainly and unequivocally discloses the essential ingredients of the offense. *S. v. Hoffman*, 328.

C Prosecution and Punishment.

b Evidence

1. Evidence in a prosecution for riot tending to show that one of the defendants was a leader of strikers of a mill, and that he incited and brought several automobile loads of strikers to the scene of the riot who were armed with sticks and joined the crowd and participated in the disturbance, and that the other defendants incited the members of the crowd and actively participated in the ensuing fight, with evidence to the contrary that the tumult resulted from acts of violence by the officers, and that the defendants were acting as peacemakers therein: *Held*, the evidence creates an issue of fact as to the defendants' guilt as aiders and abettors in the offense which was properly submitted to the jury for its determination. *S. v. Hoffman*, 328.

2. Evidence of the declaration of one of the defendants on trial for the offense of riot, made some weeks before the disturbance, of an inflammatory and threatening nature, is held competent against him in connection with evidence of his participation in the disturbance. *Ibid.*

SCHOOLS AND SCHOOL DISTRICTS.

D Government and Officers.

a Authority of Legislature, School Boards and School Agencies in General

1. It is a legislative function to formulate the means of carrying out the provisions of Article IX, section 3 of our Constitution that each county of the State be divided into school districts with one or more public schools therein to be maintained at least six months in every year. *Wilkinson v. Board of Education*, 669.

b Powers of School Boards and Attack of Proceedings and Orders

1. A county board of education is a body politic and corporate, and is authorized to prosecute and defend suits in its own name, and to

SCHOOLS AND SCHOOL DISTRICTS D b—*Continued.*

discharge certain duties imposed by statute, C. S., 5419, and where the members of the board appointed by the General Assembly fail to take the oath of office on the date prescribed by statute, C. S., 5410, but take the oath on the next succeeding day, their failure to qualify on the day prescribed does not impair the existence of the corporate body, and where they have discharged the statutory duties imposed upon them, and no vacancy has been declared by the State Board of Education, and no proceedings in the nature of *quo warranto* have been instituted to determine their right to office: *Held*, the acts of the appointees as members of the board cannot be annulled by a proceeding to restrain the board from purchasing a school site in discharge of its statutory duties. *Crabtree v. Board of Education*, 645.

c Purchase and Sale of Property

1. Where property has been conveyed to the school board of a county in fee simple, and used for school purposes from the date of the conveyance until 1926, the school board is authorized by C. S., 5470, to sell the property and execute a deed therefor. *Tucker v. Smith*, 502.

d School Sites

1. The courts will not review the statutory discretion invested in a county board of education in selecting a site and erecting a building for a school except in the instances of abuse of this discretion, and, *Held*, in this case there was no indication of abuse of discretion, it appearing that the school board had money in hand for the erection of a proper building in a district having no school building, the children of which having attended the schools of other districts. *Crabtree v. Board of Education*, 645.

e Teachers

1. Where the board of education of a county receiving State aid for the maintenance of its schools from the State equalizing fund has submitted its budget for the expenses of the current year to the county commissioners, and the amount thereof is reduced by the county commissioners and the reduction accepted by the board of education, making the reduction of certain items of its budget necessary: *Held*, the items of the budget which shall be affected are to be determined by the board of education, 3 C. S., 5429, and where the board, in the exercise of its judicial or *quasi*-judicial powers has reduced the number of teachers to be employed, *mandamus* will not lie to compel it to employ the number of teachers contemplated in the original budget, which number had been set in accordance with sections 16, 17, chapter 245, Public Laws of 1929. 3 C. S., 5585, 5586, 5595, 5596, 5601, 5603, 5608. *Wilkinson v. Board of Education*, 669.

E Kind and Nature of Schools.

b Kindergarten Schools

1. Where schools have been established and maintained in a district in accordance with the minimum requirements of the Constitution, and where the fund available for the support of the schools, de-

SCHOOLS AND SCHOOL DISTRICTS E b—*Continued.*

rived in part from local taxes validly levied in the district, is sufficient for the maintenance of said schools and also for the maintenance of a kindergarten school established in the district, the Legislature has the power to require the school board or committee of the district to maintain such kindergarten school as a part of the public school system of the district, Article IX, section 2, but if an additional tax is necessary for the maintenance of kindergarten schools they may be maintained only with the approval of the qualified voters of the district. C. S., 5443. *Posey v. Board of Education*, 306.

2. Where the General Assembly has passed a statute authorizing the school committee of a city to take under control and maintain a kindergarten school previously operated by a private corporation and to receive as a gift the property of such corporation, and thereafter the corporation has conveyed to the city in fee its property both real and personal, and the kindergarten school has been maintained out of the public school fund of the city without the levy of any special tax for that purpose, and thereafter a special tax is levied for the public school fund under a valid election, and the city is later made a local tax district by statute providing that the special tax remain in force and that the "present standard of education be maintained": *Held*, the statute imposes a mandatory duty on the school board or committee of the local tax district to maintain such kindergarten school, it not appearing of record on appeal that the school funds were insufficient for the support of the kindergarten school or that a special tax would be necessary therefor. *Ibid.*

3. Where the school board or committee of a city constituting a local tax district is required by mandate of statute to operate a kindergarten school as a part of its system of public schools, its discretionary powers extend only to the manner in which the school shall be operated and not to whether it should be operated or not, and injunction will lie restraining it from carrying out its resolution to discontinue the operation of such kindergarten school. *Ibid.*

c Junior Colleges

1. Where the board of commissioners of a city, constituting a special charter school district, under statutory authority have established and maintained, as a part of the public school system of the city, a junior college, the operating expenses of the college being paid from a special tax validly levied and collected in the city, and the general school fund of the district, derived from money apportioned from the general school fund of the county and from the special tax, is sufficient to pay the expenses of operating the elementary and high schools of the city for the constitutional term, and also for the operation of the junior college, and later the special charter school district is changed by statute to a local tax school district, the statute providing that the standard of education in the city be maintained and that the special tax remain in force and that the control of the schools of the city be vested in the board of education of the county with the same powers and duties as were

SCHOOLS AND SCHOOL DISTRICTS E c—*Continued.*

conferred upon the board of commissioners of the city: *Held*, the board of commissioners of the city had the power, in the exercise of their discretion, to operate and maintain the junior college, and the board of education of the county, as its successor, has the power to operate the said junior college, certainly so long as no additional tax is required therefor, and the granting of an order restraining the board from operating the college in its discretion is error. *Zimmerman v. Board of Education*, 259.

SECRETARY OF STATE—Service of process on, see Process B d.

SEIZURES see Intoxicating Liquor F.

SERVICE see Process B.

SHELLEY'S CASE see Wills E c.

SHERIFFS.

C Powers, Duties and Liabilities (Liability on bonds see Principal and Surety B c).

a Custody of Prisoners

1. Where a prisoner convicted of an offense is delivered by law into the hands of the sheriff, it is the sheriff's duty to receive him and commit him to the common jail and keep him in close and safe custody, and both the sheriff and his jailer appointed by him and who acts for him as his agent, C. S., 3944, may be held liable for an escape of such prisoner through failure of the sheriff or jailer to discharge their duties in this respect, C. S., 4393. *Sutton v. Williams*, 546.

2. Where a sheriff into whose hands a prisoner has been delivered by law permits the prisoner to go at large without guards or surveillance, he suffers the prisoner to escape, and he may not justify his action on the ground that the prisoner was a "trusty" the prisoner not being released from prison to do public work, and there being nothing to show the necessity of the relaxation of the statutory duties of the sheriff. *Ibid.*

SINKING FUND see Municipal Corporations K c.

SLANDER see Libel and Slander.

STATE.

E Claims Against the State.

b Nature and Grounds of Jurisdiction of Supreme Court

1. A claimant against the State is not entitled to the recommendatory jurisdiction of the Supreme Court upon petition presented to it under the provisions of Const., Art. IV, sec. 9, when no question of law is presented by the facts alleged in the petition. *Warren v. State*, 211.

STATUTES (Of limitations see Limitation of Actions).

A Enactment, Requisites and Validity.

a Constitutional Requirements in Enactment

1. Where an act incorporating a town has been passed by the Legislature in conformity with the provisions of our Constitution, Art.

STATUTES A a—*Continued.*

II, sec. 14, and at a subsequent session an act to submit the question of enlarging the boundaries of the town to the electorate of the town is also passed in conformity therewith, and an act is later passed at the same session of the Legislature to make the description more definite and to some extent adding a little more territory beyond the later boundaries, each act including the original boundaries of the town, it is not necessary that the last act be passed in accordance with Art. II, sec. 14, and an election thereunder is properly authorized. *Penland v. Bryson City*, 140; *Nixon v. Asheville*, 217.

c Presumption of Validity and Constitutionality

1. In passing upon the constitutionality of a statute every reasonable presumption in favor of its validity will be given by our courts. *Express Agency v. Maxwell*, 637.

B Construction of Statutes.

a General Rules

1. Only when the body of a statute is ambiguous and its meaning doubtful may its caption be referred to in its interpretation, and the caption may not contradict the clear meaning of the words used in the statute, especially when the caption had been made by commentators and not by the Legislature itself. *Dunn v. Dunn*, 535.

2. The courts will correct a clerical error appearing by reference to the former statute in the repealing one when it is plain by construing the two together that the error was purely a clerical one and that to permit it to stand would defeat the intent of the Legislature and to correct it will clearly carry out the intent; and, when necessary the amendatory reference to a section in the former statute will be read into the statute in the place of the section specifically referred to. *S. v. Sizemore*, 687.

3. Where an amendment to our game law contemplates in express terms the continuance of a tax by the department of conservation and development for the repayment of a sum of money, in a certain amount, to be advanced by the State Treasurer out of general funds for its initial expenses, and the amendment repeals a section by reference to number that would defeat this intent, and by reading in another section of the same act the intent would be clearly enforced: *Held*, the error is a clerical one which the courts by interpretation will correct so as to carry out the clearly expressed intent of the Legislature. *Ibid.*

c Criminal Statutes

1. A penal statute must be strictly construed in favor of the one charged with the offense it has created, and it will not be enlarged by construction to include offenses not clearly described, and all doubt will be resolved in favor of the defendant. *S. v. Heath*, 135; *S. v. Baker*, 578.

d Errors Upon Face of Statutes

1. Patent error in statute as to date of election held immaterial and not to affect validity of election. *Penland v. Bryson City*, 140.

STREET RAILROADS.

B Operation.

c Liabilities and Duties to Pedestrians and Passengers

1. A street car company owes no duty as a carrier to one who intends to take the car as a passenger until the prospective passenger has received some recognition from the motorman in answer to his signal for that purpose, and where the evidence tends only to show that such person was injured by being struck by an automobile about sixty feet after the automobile had passed the street car as the pedestrian was crossing from the curbing of a fifty-foot street to the car track, before daylight, intending to board the street car, it is insufficient to be submitted to the jury as to the street car company's liability on the question of negligence and proximate cause, and a judgment as of nonsuit thereon as to the car company is properly entered; and *held* in this case: the alleged breach of a city ordinance does not appear to have been a proximate cause. *Keiger v. Utilities Co.*, 786.

SUMMONS see Process.

SUPREME COURT see State E, Appeal and Error.

SURETY see Principal and Surety.

SURGEONS see Physicians and Surgeons.

SURPRISE AND EXCUSABLE NEGLECT see Judgments K b.

TAXATION (Municipal fiscal management and taxation see Municipal Corporations K; assessments for public improvements see Municipal Corporations G).

A Constitutional Requirements and Restrictions.

a Necessity of Submitting Bond Issue to Voters

1. Where enlargement of city power plant is to be paid for out of the profits thereof it is not required that the question of enlargement be submitted to the voters. *Mewborn v. Kinston*, 72.

c Uniform Rule, Ad Valorem and Classification

1. The power of the Legislature to classify subjects for the purpose of taxation is flexible, and the reasonableness of any classification will generally be construed with reference to the facts of the particular case, the predominant limitation on the power to classify being that the classification must be reasonable and not arbitrary and must rest upon some substantial difference between the classes, and that the burden must be equal upon all in the same class, and a special classification by statute of wholesale grocers operating a cold storage chamber of some character for the preservation of fresh meats, as distinguished from those who handle only canned meats not requiring refrigeration, is a reasonable classification imposing an equal burden upon all of the class, and is constitutional and valid. *Provision Co. v. Maxwell*, 661.

2. While the provisions of Article V, section 3, of the Constitution of North Carolina requiring taxes on property to be levied by a uniform rule does not expressly apply to taxes on trades, professions,

TAXATION A c—*Continued.*

franchises and incomes, it does apply to such taxes from its inherent justice, but the General Assembly has the power to classify trades, professions, franchises and incomes for taxation where the classifications are reasonable and not arbitrary and are based upon substantial differences between the classes and apply equally to all within the classification. *Tea Co. v. Maxwell*, 433.

3. Section 162 of chapter 345 of the Public Laws of 1929, imposing a license tax on those operating chain stores of fifty dollars for each store operated under the same ownership or management where there is more than one store so operated, is a reasonable classification based upon a substantial difference, and applies equally to all within the class, and the statute is constitutional and valid, Article V, section 3, the difference between the act of 1929 and that of 1927 which imposed such a tax where there were more than five stores operated under the same management or ownership, creating a discrimination in favor of those operating chains of less than six stores, pointed out by CONNOR, J. *Ibid.*

4. The provisions of the Fourteenth Amendment to the Federal Constitution providing that no State "shall deprive any person of life, liberty or property without due process of law" or "deny to any person within its jurisdiction the equal protection of the law" does not prohibit a state from classifying trades, professions, franchises and incomes from taxation where the classification is reasonable and not arbitrary, and is based upon a substantial difference between the classes, and applies equally to all within a class, the principles upon which the prohibitions of the Fourteenth Amendment are founded being similar to, if not identical with, our constitutional requirement that taxes for revenue on trades, etc., be by uniform rule. *Ibid.*

d Constitutionality of License and Franchise Taxes

1. A tax upon express companies of $15.00 per mile of track over which they operate in this State, when the net income is six per cent or less, levied under the provisions of statute, is valid under the provisions of our State Constitution, Art. V, sec. 3, providing that the General Assembly may tax trades, professions, franchises and income. *Express Agency v. Maxwell*, 637.

2. Where a statute imposes a tax upon express companies based upon the mileage of track in this State over which they operate, levying a tax of $15.00 per mile when the net income of the company is six per cent or less, $18.00 when the net income does not exceed eight per cent, and $21.00 per mile when the net income exceeds eight per cent, and the State levies the minimum tax on an express company, which sues to recover the amount so paid, the question of the ratio of the company's net earnings in this and other States and the amount of the net income are immaterial to the conclusion as to whether the tax is valid in the instant case, the tax levied being constant regardless of income or the ratio between interstate and intrastate business, and the validity of the higher rate of taxes levied by the statute is not directly presented for decision. *Ibid.*

TAXATION A—*Continued.*

g Confiscatory Taxation

1. Express companies are exempt from the operation of sections 210. 211 of chapter 345 of the Revenue Act of 1929 by section 213 thereof, and under the provisions of section 205, construed in connection therewith, the taxes imposed on express companies are State taxes upon their franchises and occupations, and counties are prohibited from levying a privilege or license tax, and the amount levyable by municipalities is limited to a sliding scale of small proportions, evidently for the use of their streets, and where a tax levied on an express company under the provisions of the statute is $15.00 per mile of track over which it operates in this State, amounting to slightly in excess of 12 per cent of its gross revenue exclusively derived from intrastate business, not taking into account large gross receipts from interstate business, it will not be held as a matter of law that the tax is unconstitutional as being confiscatory. *Express Agency v. Maxwell*, 637.

h Interstate Commerce

1. The State statute taxing the income of a foreign corporation in proportion as the fair cash value of its real estate and tangible personal property in this State on the date of the close of the fiscal year is to the fair cash value of its entire real estate and tangible personal property then owned by it, with no deduction of encumbrances thereon and expressly excluding from the meaning of the words "tangible property" moneys in bank, shares of stock, bonds, notes, credits, evidences of debt, applying equally to domestic corporations, is not arbitrary or unreasonable, nor does it impose a burden on interstate commerce, and the statute is constitutional upon its face. *Maxwell v. Hans Rees' Sons*, 42.

2. Where the manufacturing plant of a foreign corporation is in this State and its warehouse and distributing point is in another State, the corporation cannot maintain that its profits are derived from the separate operations of buying raw materials, manufacturing, and selling, and that therefore the greater portion of its profits are derived from operations outside the State and that the State statute levying a tax on its income in proportion to the property inside the State is to its property outside the State is unconstitutional in its operation, the buying, manufacturing and selling being component parts of one operation, and the statute prescribes a fair, reasonable and constitutional method of taxing the property within the State. *Ibid.*

3. Where a foreign corporation has paid its income tax in this State under the provisions of a valid statute, evidence introduced for the purpose of showing that in the instant case the statute was unconstitutional in its operation is properly excluded where it is not material or relevant for the purpose. *Ibid.*

4. Where a foreign corporation does business in this State, the right to carry on its business here is subject to taxation as a franchise irrespective of the fact that part of its business is in interstate commerce, the amount of the tax not being affected by the increase or decrease in interstate business. *Express Agency v. Maxwell*, 637.

TAXATION—*Continued.*

B Liability of Persons and Property.

c License Taxes

1. Section 162 of chapter 345 of the Public Laws of 1929, imposing a tax on those operating branch or chain stores of fifty dollars for each store where there is more than one store under the same supervision, management or ownership, is a license tax for the privilege of operating chain stores imposed for the purpose of raising revenue, and it is not an *ad valorem* tax, nor does it seek to regulate chain stores under the police power, and the tax is in accord with the fiscal policy of the State of raising revenue for State purposes by the imposition of taxes on trades, professions, franchises and incomes, and leaving to the counties and municipalities for their support *ad valorem* taxes on real and personal property. *Tea Co. v. Maxwell*, 433.

2. Where the charter of a city provides for the raising of revenue by license taxes on certain trades, professions, etc., among which is specified "merchants, itinerants or dealers, selling bankrupt or fire sales of any kind of goods," etc., a merchant purchasing a bankrupt stock, and increasing it by the purchase of other stock, and remaining in business for a period of over a year, during which time the bankrupt stock is sold in the usual course of business, is not liable for the tax imposed upon those selling bankrupt stock and is entitled to recover an amount paid by him thereunder under protest, the merchant not being subject to the tax if valid, and being entitled to recover if the tax is invalid. The construction of the statute, upon which may depend its validity, is not necessary to be decided in this case. *Kohn v. Elizabeth City*, 529.

E Objections to, and Collection and Enforcement of Taxes.

b Injunctive Proceedings

1. The legality of a tax assessed by a city may be tested in proceedings in injunction. *Reynolds v. Asheville*, 212.

c Actions to Recover Taxes Paid Under Protest

1. Where a foreign corporation pays an income tax assessed by the State under protest, but pays without protest such tax assessed for the previous years, its protest for the one year does not entitle it to maintain an action to recover the taxes paid without protest on the ground that the tax was wrongfully collected. *Maxwell v. Hans Rees' Sons*, 42.

2. In order for a taxpayer to avoid the payment of a tax claimed by him to have been illegally assessed by the State, he must comply with the procedure provided in the statute, section 464, chapter 80, Public Laws of 1927, and where the statute specifies that he must pay the tax to the proper officer and notify him in writing that he pays under protest, and at any time within thirty days demand its refund from the State Commissioner in writing, and if not refunded in ninety days, bring action to recover the amount, the remedy given must be followed in order for the taxpayer to recover the amount, and the failure of the taxpayer to make the demand required until nearly two years after the payment of the tax is

TAXATION E c—*Continued.*

fatal, 3 C. S., 7979(a), requiring the State Auditor to issue his warrant in certain instances, has no application. *Bunn v. Maxwell*, 557.

3. Where a taxpayer has paid a tax imposed by statute, following statutory procedure, and seeks to recover the amount so paid on the ground that the statute levying the tax is invalid, the burden is upon him to show the invalidity of the statute. *Express Agency v. Maxwell*, 637.

TORTS—Of cities see Municipal Corporations E; negligence see Negligence, Highways B, Railroads D, Master and Servant C.

TRESPASSERS see Negligence A c 1, Railroads C c.

TRIAL (Of criminal cases see Criminal Law I).

B Reception of Evidence.

c Objections and Exceptions

1. An objection to the admission of the testimony of a witness will not be sustained on appeal where the same testimony has been given by another witness without objection. *S. v. Hall*, 685.

e Withdrawal of Incompetent Evidence

1. The trial court has the power to withdraw incompetent evidence from the jury and instruct it not to consider it, and where an incompetent question is asked a witness over objection, and the witness' answer is promptly stricken from the record by the court and the jury instructed not to consider it, an exception thereto will not be sustained on appeal. *In re Will of Yelverton*, 198 N. C., 746, cited and distinguished. *Lane v. Paschall*, 364; *Eaker v. International Shoe Co.*, 379.

C Conduct and Course of Trial.

b Matters of Procedure Within Discretion of Trial Court

1. Where, in an action in ejectment the trial court orders the defendant to file a bond conditioned for the payment of such sum as the plaintiff might recover as reasonable rent for the property, and continues the case to the next term, the plaintiff's motion at the call of the case at the succeeding term that the defendant not be allowed to present his defense because of his failure to file the bond is in effect a motion that defendant's answer be stricken from the record and judgment by default entered, and is addressed to the discretion of the trial court, and the refusal of such motion is not reviewable on appeal. *Texas Co. v. Fuel Co.*, 492.

D Taking Case or Question from Jury.

a Nonsuit (Judgment of nonsuit as bar to subsequent action see Judgments L. A.; nonsuit in criminal cases see Criminal Law I j; in negligence cases see Negligence D c, Highways B j)

1. The allowance of a motion as of nonsuit is based upon purely statutory grounds, and the requirements of the statute, C. S., 567, must be strictly followed, and where the defendant fails to move for judgment as of nonsuit at the close of the plaintiff's evidence, his

TRIAL D a—*Continued.*

exception to the refusal of his motion therefor at the close of all the evidence is not sufficient to present on appeal the question of whether upon all the evidence the plaintiff is entitled to recover. *Penland v. Hospital*, 314.

2. In order for a defendant to have a case reviewed on appeal for insufficiency of the plaintiff's evidence, his motion as of nonsuit must be renewed at the close of all the evidence, C. S., 567, or he should in apt time offer a special prayer for an instruction directing a verdict in his favor. C. S., 565. *Lane v. Paschall*, 364.

3. Upon a motion as of nonsuit, the evidence which makes for the plaintiff's claim and which tends to support his cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, is to be taken and considered in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable intendment thereof and every reasonable inference to be drawn therefrom. *Nelson v. Ins. Co.*, 443.

4. In order to recover damages of defendant for the wilful burning of plaintiff's barn and contents, it is required that the evidence raise more than a conjecture or surmise, and that it be more substantial than a mere scintilla. *Denny v. Snow*, 773.

E Instructions.

b Expression of Opinion by the Court

1. A correct charge of the court upon the evidence in a case will not be held for error as containing an expression of opinion prohibited by C. S., 564, when nothing of this character appears from a careful perusal of the charge on appeal that could bias a mind of ordinary firmness and intelligence. *Keller v. Furniture Co.*, 413.

c Form, Requisites and Sufficiency

1. Where the law arising from the evidence introduced upon the trial of an action is simple in its application and not disputed, the trial judge in his instructions to the jury does not commit reversible error in failing to go into great elaboration of detail when the jury must have understood the application of the law to the evidence and the issues. C. S., 564. *Teasley v. Burwell*, 18.

2. Where the question of proximate cause is essential and material, and arises from the evidence in an action to recover damages for the negligent infliction of a personal injury, the failure of the trial court to correctly charge the jury thereon is error, and the omission being to a substantial and material feature of the cause, the defendant is entitled to a new trial without having made a special request therefor, C. S., 564, and where the judge of the Superior Court, upon appeal from judgment of a municipal court has reversed and remanded the cause for such error, upon appeal to the Supreme Court the judgment of the lower court will be affirmed. *Moss v. Brown*, 189.

3. An instruction which fails to explain the law if the facts should be found by the jury as outlined in the contentions of a party is erroneous. *Graves v. O'Connor*, 231.

TRIAL E—*Continued.*

e Requests for Instructions

1. Where evidence is properly admitted by the trial court for a restricted purpose, the objecting party should, at the time it is admitted, ask the court to instruct the jury that it be considered only for the purposes for which it is competent, and a general exception will not be sustained. Rules of Practice in the Supreme Court No. 21. *Ward v. Waynesville*, 273.

2. Where the defendant has privately requested the court to give certain instructions, and this request is overlooked by the court in his charge to the jury, and the defendant fails to call attention to the inadvertence, an exception taken for the first time after verdict is too late, and will not be considered on appeal. *Keller v. Furniture Co.*, 413.

3. Where the verdict of the jury makes the refusal of the trial court to give special instructions requested immaterial, and the charge to the jury taken as a whole is correct and covers all material aspects of the law presented by the evidence, and the issues submitted were proper and determinative of the controversy, the refusal to give the requested instructions will not be held for error. *Nelson v. Ins. Co.*, 443.

g Construction and General Rules Upon Review

1. A charge of the court to the jury which is correct as to the duty of an employer to furnish an employee a reasonably safe place to work in the exercise of ordinary care, will not be held for reversible error, if the error, if any, is in the appellant's favor, or for the omission of the word "approved" in regard to appliances "approved and in general use," when from the entire charge and the circumstances of the case it appears that the appellant has not been prejudiced thereby, the case having been fully and correctly determined upon the principle of *res ipsa loquitur*. *Eaker v. International Shoe Co.*, 379.

2. A charge of the trial court to the jury will not be held for reversible error when construing the charge as a whole it correctly gives the law applicable to the evidence in the case. *Pyatt v. R. R.*, 397.

F Issues.

a Form and Sufficiency in General

1. Where an issue submitted to the jury is fairly determinative of the rights of the parties and presents all material phases of the controversy for the determination of the jury it is sufficient. *Knight v. Lewark*, 407.

2. The submission by the trial court to the jury of only one issue will not be held for error where the appellant has been afforded ample opportunity to present all his contentions, both as to law and fact, thereunder. *Waters v. Waters*, 667.

TRUSTS.

D Revocation of Trusts.

a Voluntary Trusts

1. Where the daughter of a British subject takes property absolutely from the trustees under his will upon her marriage, and marries in

TRUSTS D a—*Continued.*

North Carolina, executing in this State a deed of settlement in trust, without consideration, for beneficiaries of this State, upon certain contingencies: *Held*, the *lex loci contractu* governing the marriage settlement is that of North Carolina and controlled by the provisions of our statutes as to its revocation. C. S., 996, as amended by Laws of 1929. *MacRae v. Trust Co.*, 714.

2. Where a woman receives property without restriction from her father's estate and executes a deed in marriage settlement in trust without consideration, the deed is a voluntary trust in contemplation of C. S., 996, as amended by the Public Laws of 1929. *Ibid.*

3. In order to come within our statute governing the revocation of a marriage settlement made in trust, it is required that the trust be voluntary, for the benefit of the trustee or some one *in esse* with a future contingent interest limited to some one not *in esse* or not determinable until the happening of a certain event, and to revoke the deed of trust, if recorded, it is required that the deed of revocation be recorded: and *Held*, where a woman executes a trust deed of settlement upon her marriage for the benefit of her children who may be born of the marriage, depending upon their reaching a certain age, the trust interest subject to be changed by her during her life, after the birth of children, their interests do not *ipso facto* become vested, and she may revoke the trust upon giving a sufficient deed to that effect and in compliance with the statute. *Ibid.*

USURY (Limitation of action for, see Limitation of Actions E c).

A Usurious Contracts and Transactions.

a Construction of Contract or Transaction as to Usury

1. Usury is the taking, receiving or charging a greater rate of interest than six per cent, either before or after the interest may accrue, when knowingly done, and it works a forfeiture of the interest and when the unlawful interest has been paid the debtor may recover twice the amount so paid in an action in a court of competent jurisdiction. C. S., 2306. *McNeill v. Suggs*, 477.

VENDOR AND PURCHASER—Affixed chattels passing with realty see Fixtures A a; purchaser bound by conditions in deed upon acceptance thereof see Deeds and Conveyances C f 1.

VENUE.

A Nature and Subject of Action.

b Actions Against Governmental Officers

1. An action involving the official conduct of the officers of an incorporated town in a certain county has its proper venue in that county, and where the town and others have been made defendants the action is properly removed there from another county. *Boyd v. Bank*, 687.

B Residence of Parties.

a Venue of Actions Where One Party is Nonresident

1. The proper venue of an action by a nonresident plaintiff against a newspaper corporation with its principal office or place of business in this State is in that county, and an action brought in a different

VENUE B a—*Continued.*

county in this State is removable thereto on defendant's motion duly made, and the facts so found by the lower court are not reviewable on appeal. *McCue v. Times-News Co.*, 802.

WAR RISK INSURANCE see Insurance N a.

WASTE see Life Estates B b.

WATER AND WATER COURSES see Highways D a.

WEAPONS see Concealed Weapons.

WILFUL AND WANTON INJURY see Execution K a.

WILLS.

C Requisites and Validity.

d Holographic Wills

1. It is not required by our statute that a holographic will be dated or the place of its execution stated therein, and where printed words, unrelated to the subject-matter of the paper-writing, are found on the paper used for the purposes of a will and the written part clearly and unmistakably disposes of the estate to designated persons and is in the handwriting of the testator with her signature affixed, and is found after her death on two unattached sheets of paper in a sealed envelope marked as her will, in a place where her valuable papers were kept by her, and these are established as a fact by the jury upon sufficient evidence in such matters, the printed words on the paper are regarded as surplusage, and a judgment below sustaining the entire written part as a valid holographic will will be sustained on appeal in the absence of evidence of fraud or undue influence. *In re Will of Lowrance*, 782.

E Estates and Interests Created (Right of devisee to mortgage property devised see Mortgages F d).

b Estates and Interests Created

1. Construing a devise of lands to the testator's three daughters by name for life and at their death to the heirs of their bodies in fee simple forever, the land to be divided equally between them after the testator's death, with further provision that if either daughter die without a living heir of her body her share should be divided between all of the testator's children then living, or having living issue: *Held*, the controlling intent of the testator was not to give his daughters a fee-simple estate in the lands devised, but a life estate only, and at the death of a daughter leaving two surviving children, such children take a fee simple in their mother's share as tenants in common, and the rule in *Shelley's case* does not apply. *Doggett v. Vaughan*, 424.

2. A bequest to the testator's wife of all his personal property to have the use and benefit of as long as she may live, and in the event that she does not use it all "it is my wish and desire . . . that she give and bequeath" certain sums to designated persons, without further restraint either by residuary clause or otherwise, passes the absolute title to the personal property to the wife who may dispose of that remaining at her death as she desires, the wording

WILLS E b—*Continued.*

of the testator's will being insufficient to impose a trust upon the property or to control her disposition thereof, and being merely an expression of his wish in regard thereto. ***Dixon v. Hooker***, 673.

3. The testator, knowing the children of his daughter were illegitimate, devised to his daughter after the life time of his wife, his lands to her if she remained unmarried but should she marry to her two illegitimate children the proceeds of sale of the land for equal division between them: ***Held***, the remainder to the testator's said two grandchildren is construed to ascertain the testator's benevolent intent to take effect as an executory devise as a limitation after the marriage of the daughter, and not void as being upon a condition subsequent in general restraint of marriage, requiring no reentry or assertion of claim to defeat the prior estate. ***Griffin v. Doggett***, 706.

c *Rule in Shelley's Case*

1. In order for the rule in *Shelley's case* to apply, those who are to take an estate under a devise must do so in the character and in the quality of heir in accordance with the canons of descent, and where, taking a part of a clause of a will, the rule would be applicable, it will not prevail when construing the entire clause the evident intent of the testator appears to the contrary. ***Doggett v. Vaughan***, 424.

WITNESSES—Impeaching, see Evidence D f; Privileged Communication see Evidence D e; right to question, as to belief in God see Criminal Law L e 1.

WORKMEN'S COMPENSATION ACT see Master and Servant F.

"WORTHLESS CHECKS" see Bills and Notes I f.

ZONING ORDINANCES see Municipal Corporations H b.